

FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION



DECEMBER 1987
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DECEMBER 1987

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DECEMBER 1987

Review was granted in the following cases during the month of December:

Secretary of Labor, MSHA v. Otis Elevator Company, Docket No. PENN 86-262. (Judge Maurer, November 11, 1987).

Secretary of Labor on behalf of Roger Lee Wayne, Sr. v. Consolidation Coal Company, Docket No. WEVA 87-89-D. (Judge Weisberger, November 20, 1987).

Review was denied in the following cases during the month of December:

Emerald Mines Company v. Secretary of Labor, MSHA, Docket No. PENN 85-298-R. (Judge Melick, November 2, 1987).

Eddie Johnson v. Scotts Branch Company, Docket No. KENT 87-26-D. (Judge Koutras, November 2, 1987).

Utah Power & Light Company, Mining Division v. Secretary of Labor, MSHA, and United Mine Workers of America, Docket Nos. WEST 87-130-R, etc. (Petition for Interlocutory Review of Judge Morris' October 14, 1987 Order).

Secretary of Labor, MSHA v. NACCO Mining Company, Docket No. LAKE 85-87-R, LAKE 86-2. (Judge Merlin, November 19, 1987).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 11, 1987

EMERY MINING CORPORATION

:

v.

:

Docket No. WEST 86-35-R

:

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

:

:

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), requires the Commission to determine the meaning of the term "unwarrantable failure" as used in section 104(d) of the Mine Act. 30 U.S.C. § 814(d). For the reasons that follow, we conclude that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

I.

This proceeding involves a violation by Emery Mining Corporation ("Emery") of 30 C.F.R. § 75.200, the mandatory underground coal mine roof control standard. Commission Administrative Law Judge John J. Morris found that the violation occurred and was the result of Emery's unwarrantable failure to comply with the cited standard within the meaning of section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). 1/

1/ Section 104(d)(1) of the Act states in part:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation

8 FMSHRC 930 (June 1986)(ALJ). The sole issue on review is whether this finding of unwarrantable failure was proper. For the reasons that follow, we conclude that Emery did not exhibit the kind of aggravated conduct necessary to sustain a finding of unwarrantable failure. Accordingly, we reverse.

Emery's Deer Creek mine is an underground coal mine located in Huntington, Utah. On October 22, 1985, Emery's safety department received reports that along the First South haulage track, between the No. 65 and No. 66 crosscuts, a section of chain link mesh was hanging from the roof. That same day Emery safety engineer, Gary Christensen, was instructed to investigate the problem. Christensen was accompanied underground by Dick Jones, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), and by Max Tucker, a member of the union safety committee.

Along the haulage track, between the No. 65 and No. 66 crosscuts, chain link mesh had been bolted to the roof. Christensen found three or four inches of loose coal resting on the mesh. The coal had broken from the roof, fallen onto the mesh, and caused the mesh to sag. While Christensen clipped the mesh to remove the coal, Jones and Tucker examined the surrounding area and found four roof bolts, each of which was missing its six-inch-square bearing plate. The MSHA inspector believed that the pressure of the roof had "popped" the bearing plates off the bolts. Approximately 10 feet away from these bolts, fallen coal had caused the chain link mesh to sag and press across a trolley guard.

Inspector Jones concluded that the roof conditions between the No. 65 and No. 66 crosscuts indicated that the roof was not adequately

do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation ... to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

S.C. §814(d)(1).

supported in violation of section 75.200. 2/ Having made further findings that the violation was of a significant and substantial nature and was the result of the operator's unwarrantable failure to comply with the standard, the MSHA inspector issued to Emery a citation pursuant to section 104(d)(1) of the Mine Act (n. 1, supra).

Emery contested the citation, asserting that it was not in violation of section 75.200 and that, in any event, the violation was not the result of its unwarrantable failure. Following an evidentiary hearing, the judge credited the inspector's testimony that a lack of adequate roof support was shown by virtue of the four roof bolts that had "popped" their plates. 8 FMSHRC at 935. The judge held that the sagging in the chain link mesh itself did not violate the standard, but served to focus attention on the area of the entry where the violation occurred. Id. Noting that the First South haulage track was a regularly traveled entry in the mine, the judge concluded that the roof bolts had "popped" their plates at least a week before October 22, and that Emery's safety personnel, who were required to inspect the haulage track for safety hazards, "should have known of the condition." 8 FMSHRC at 936. The judge therefore concluded that the violation was due to Emery's unwarrantable failure to comply with section 75.200. Id.

On review Emery contends that if the judge's decision stands, any violation in an active area of a mine will be an unwarrantable failure violation because supervisors and preshift examiners travel through and inspect all such areas. Emery argues that the judge's decision construes unwarrantable failure as equivalent to ordinary negligence and that only a more stringent legal standard, one involving aggravated conduct, can be the basis for an unwarrantable failure finding. 3/ We agree.

2/ Section 75.200 provides in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form....

(Emphasis added.)

3/ The American Mining Congress ("AMC") has filed a brief amicus curiae that essentially presents the same arguments put forth by Emery.

II.

In the Mine Act the term "unwarrantable failure" appears only in section 104(d). Its presence and use is of vital importance in the enforcement of the Act. See Nacco Mining Co., 9 FMSHRC 1541, 1545-46 (September 1987); UMWA v. FMSHRC and Kitt Energy Corp., 768 F.2d 1477, 1479 (D.C. Cir. 1984). See also S. Rep. No. 181, 95th Cong., 1st Sess. 31 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619 (1978) ("Mine Act Legis. Hist."). Section 104(d) is an integral part of the Act's enforcement scheme, a scheme which, as an incentive for operator compliance, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (April 1981). Under this enforcement scheme, sections 104(a) and 110(a) provide that the violation of any mandatory safety or health standard requires the issuance of a citation and assessment of a monetary civil penalty. 30 U.S.C. §§ 814(a) & 820(a). Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required and a greater civil penalty is assessed. 30 U.S.C. §§ 814(b) & 820(b).

Under section 104(d) an unwarrantable failure finding serves to trigger the application of yet more rigorous sanctions. As the U.S. Court of Appeals for the District of Columbia Circuit has explained:

An "unwarrantable failure" citation commences a probationary period: If a second violation resulting from an "unwarrantable failure" is found within 90 days, the Secretary must issue a "withdrawal order" requiring the mine operator to remove all persons from the area ... until the violation has been abated....

Once a withdrawal order has been issued, any subsequent unwarrantable failure results in another such order. This "chain" of withdrawal order liability remains in effect until broken by an intervening "clean" inspection. That is, "an inspection of such mine [which] discloses no similar violations."

UMWA v. FMSHRC and Kitt Energy Corp., 768 F.2d at 1478-79 (emphasis in original). The court described this section 104(d) "chain" of citations and withdrawal orders, keyed to the operator's unwarrantable failure to comply, as "among the Secretary's most powerful instruments for enforcing mine safety." 768 F.2d. at 1479. The threat of the "chain" is a forceful incentive for the operator to exercise special vigilance in health and safety matters. Nacco Mining Co., supra, 9 FMSHRC at 6.

Although section 104(d) is a key element of the overall attempt to improve health and safety practices in the mining industry (Mine Act

Legis. Hist. at 618-620), the Act does not define the term "unwarrantable failure." Consequently, in determining its meaning, we must turn to intrinsic and extrinsic aids of statutory construction. We must examine the meaning of the term with reference to both its meaning in ordinary usage and its context in the statute, as well as any legislative history and judicial precedent relating to "unwarrantable failure."

We first determine the ordinary meaning of the phrase "unwarrantable failure." "Unwarrantable" is defined as "not justifiable" or "inexcusable." "Failure" is defined as "neglect of an assigned, expected, or appropriate action." Webster's Third New International Dictionary (Unabridged) 2514, 814 (1971) ("Webster's"). Comparatively, negligence is the failure to use such care as a reasonably prudent and careful person would use and is characterized by "inadvertence," "thoughtlessness," and "inattention." Black's Law Dictionary 930-31 (5th ed. 1979). Conduct that is not justifiable and inexcusable is the result of more than inadvertence, thoughtlessness, or inattention. Thus, the ordinary meaning of the phrase "unwarrantable failure" suggests more than ordinary negligence. Indeed, we note the Secretary's position that this view of unwarrantable failure represents the intent of the phrase. The Secretary insists that to equate ordinary negligence with unwarrantable failure is to "grossly mischaracteriz[e]" his position. S. Reply Br. 3, 5.

In statutory interpretation, the ordinary meaning of words must prevail where that meaning does not thwart the purpose of the statute or lead to an absurd result. In re Trans Alaska Pipeline Rate Case, 436 U.S. 631, 643 (1978). Far from leading to an absurd result, construing "unwarrantable failure" to mean aggravated conduct constituting more than ordinary negligence produces a result in harmony with the Mine Act's statutory enforcement scheme of providing increasingly severe sanctions for increasingly serious mine operator behavior. Within the Mine Act are found distinct descriptions of types of operator conduct that evoke particular sanctions. "Negligent" conduct is considered when proposing and assessing civil penalties. 30 U.S.C. §§ 815(b)(1)(B) & 820(i). Conduct that is "knowing" and "willful" may result in civil or criminal sanctions against individual corporate agents. 30 U.S.C. §§ 820(c) & (d). Conduct determined to be characterized by an unwarrantable failure to comply with a mandatory regulation results in a section 104(d) "chain" of citations and orders. The Mine Act's use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a graduated enforcement scheme. Cf. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 843 (D.C. Cir. 1984); National Insulation Transp. Committee v. I.C.C., 683 F.2d 533, 537 (D.C. Cir. 1982).

Construing unwarrantable failure to mean aggravated conduct constituting more than ordinary negligence is consistent with the manner in which the Secretary enforces the Mine Act. In civil penalty cases brought before the Commission, the Secretary often argues that an operator was negligent in allowing a violation to exist, yet the

Secretary does not assert that the operator's conduct was marked by unwarrantable failure. Similarly, in settling civil penalty cases the Secretary often agrees to delete unwarrantable failure findings because, upon further consideration, the operator's negligence was less egregious than had been believed. Equally significant, the Secretary's civil penalty proposal regulations recognize degrees of negligence, 30 C.F.R. § 100.3(d), but distinguish unwarrantable failure violations as distinct and subject to higher special penalty assessments. 30 C.F.R. § 100.5(b). Further, the Secretary has represented before the Commission that unwarrantable failure findings constitute approximately three percent of the citations and orders issued by MSHA. ^{4/} Amicus AMC attached to its brief official MSHA reports, which indicate that in 1986 the Secretary issued 126,026 citations that were the result of operators' "low" or "moderate" negligence, and 3,462 violations that were the result of operators' "high negligence" or "reckless disregard." The latter number roughly corresponds with the 3,572 "unwarrantable failure" citations issued in 1986. AMC Br. 16-17 and attachments D & E. Thus, in enforcement practice as well as in theory, the Secretary views unwarrantable failure as aggravated conduct that is more than ordinary negligence. See S. Reply Br. 3, 5; S. Br. 9.

Construing unwarrantable failure as aggravated conduct constituting more than ordinary negligence also is essentially in harmony with the legislative history bearing on the term. Unwarrantable failure sanctions first appeared in section 203(d) of the Federal Coal Mine Safety Amendments Act of 1965. 30 U.S.C. § 472 (1966). Section 203(d) was carried over with minor changes as section 104(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(c) (1976) ("Coal Act"), and section 104(c) was, in turn, carried over without substantive change as section 104(d) of the Mine Act. In summarizing the major provisions of the bill that became the Coal Act, the Conference Committee stated that unwarrantable failure to comply meant "the failure of an operator to abate a violation he knew or should have known existed." Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975) ("Coal Act Legis. Hist."). In addition, the House Managers stated that unwarrantable failure to comply meant "the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or lack of reasonable care on the operator's part." Coal Act Legis. Hist. 1512. Further, in Zeigler Coal Co., 7 IBMA 280, 295-9 (March 1977), the Interior Board of Mine Operations Appeals interpreted unwarrantable failure to mean the failure to abate conditions or practices the operator "knew or should have known existed or which it failed to abate because of due diligence, or because of indifference or lack of reasonable care." In drafting the 1977 Mine Act, the Senate Committee report cited Zeigler with approval. Mine Act Legis. Hist.

4/ See the Secretary's brief on review in Helen Mining Co., 9 FMSHRC 1095 (June 1987); S. Br. 11. See also statement of Solicitor of Labor, George Salem, Nacco Mining Co., 9 FMSHRC 1541 (September 1987), Oral Arg. Tr. 20.

Thus, the legislative histories of the Coal Act and the Mine Act and the Board's definition in Zeigler make reference to "unwarrantable failure" in terms of "indifference," "knew or should have known," "lack of due diligence," and "lack of reasonable care." Although neither the legislative histories nor the Board further explored the meaning of these terms in any detail, the ordinary meanings of these terms are largely congruent with the aggravated conduct meaning discussed above. Indeed, in discussing aggravated conduct that constitutes unwarrantable failure, the Commission has concurred previously with the Board's Zeigler decision to the extent that an unwarrantable failure may be proved by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of "indifference, willful intent or serious lack of reasonable care." United States Steel Corp., 6 FMSHRC 1423, 1437 (June 1984); Westmoreland Mining Co. 7 FMSHRC 1338, 1342 (September 1985).

The descriptions of unwarrantable conduct proffered in the legislative histories and Zeigler in large measure harmonize with and complement the conclusion that unwarrantable failure means more than ordinary negligence. The usual meaning of "indifference" is of "little consequence" or "total or nearly total lack of interest." Webster's 1151. In common legal parlance "indifferent" conduct is conduct more aggravated than ordinary negligence. Prosser and Keaton on the Law of Torts 212 (1984). Likewise, under the Mine Act a corporate agent who "knowingly" authorizes a violation of a mandatory health or safety standard under the Act is subject to personal civil and criminal liability. 30 U.S.C. § 820(c). This heightened liability is clearly a Congressional response to more serious breaches of operator conduct, i.e., aggravated conduct. The term "knowingly" has been interpreted to mean "knew or had reason to know." Secretary v. Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983); Secretary v. Roy Glenn, 6 FMSHRC 1588, 1585-86 (July 1984). Therefore, the references in the legislative history and in Zeigler to "indifference" and "knew or should have known"

5/ Zeigler was decided on a remand from the U.S. Court of Appeals for the District of Columbia Circuit. UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976). The issue before the D.C. Circuit was whether an "unwarrantable failure" closure order (and subsequent closure orders in the chain) had to be based both on "unwarrantable failure" and "significant and substantial findings." The court held that only a finding that the violation was the result of the operator's unwarrantable failure to comply was required. Before the court, the UMWA had also challenged the Board's definition of "unwarrantable failure," established in a prior, unappealed case. Eastern Associated Coal Co., 3 IBMA 331 (September 1974). In Eastern, the Board had defined "unwarrantable failure" as intentional or knowing failure to comply or reckless disregard for the health and safety of miners. Id. at 356. The court in Kleppe explicitly declined to address the definition of "unwarrantable failure," but left the Board the option to revisit the issue. 532 F.2d at 1407 n.7.

describe aggravated forms of operator conduct.

With regard to the phrases "lack of due diligence" and "lack of reasonable care" also appearing in these sources, we recognize that the phrases, if considered in isolation, can be viewed as referring to an ordinary negligence test. However, ascribing such a meaning to "unwarrantable failure" cannot be reconciled with either the purpose of unwarrantable failure sanctions or with the ordinary meaning of the term unwarrantable failure itself. Where the ordinary meaning of the phrase "unwarrantable failure" complements and effectuates the enforcement scheme of the Mine Act that meaning must prevail. As the U.S. Court of Appeals for the District of Columbia Circuit recently stated in a related context, "it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself." American Civil Liberties Union v. FCC, 823 F.2d 1554, 1568 (D.C. Cir. 1987). Thus, to the extent that these limited references in the legislative history are at odds with the structure and purpose of the Act, as well as other parts of the legislative history, they are not controlling. Abourezk v. Reagan, 785 F.2d 1043, 1055 n.11 (D.C. Cir. 1986), cert. granted, ___ U.S. ___, 107 S.Ct. 666 (December 15, 1986). See also United Air Lines, Inc. v. CAB, 569 F.2d 640, 647 (D.C. Cir. 1977). Therefore, we conclude that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

III.

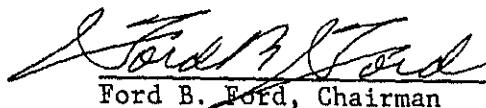
Turning now to the specific violation at issue, we conclude that substantial evidence does not support the judge's finding that the violation resulted from Emery's unwarrantable failure to comply with section 75.200.

The judge premised his finding that the lack of adequate roof support was the result of an unwarrantable failure upon his conclusion that the four roof bolts were without their bearing plates for at least a week before their condition was detected and that Emery's preshift and onshift inspectors should have detected and corrected the condition. 8 FMSHRC at 936. Under the circumstances of this case, the fact that Emery's preshift or onshift examiners did not detect the four roof bolts with "popped" plates is not an adequate basis for a finding of such aggravated conduct constituting unwarrantable failure.

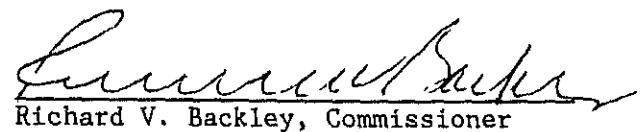
Emery was not indifferent to roof support in the entry between the No. 65 and No. 66 crosscuts. Indeed, the record shows that Emery knew for some time of the instability of the roof along the track haulage, including the area between the cited crosscuts, and took exceptional measures to provide adequate roof support. Emery placed cribs on one side of the track and timbers on the other as close together as possible. Emery placed steel mats on the roof, running crossways, and pinned the mats with roof bolts. In addition, Emery installed chain link mesh between the mats with another set of roof bolts. Emery exceeded the requirements of its approved roof control plan by placing some roof bolts as close together as one or two feet. The area between the crosscuts was approximately 55 feet long. The area

contained hundreds of roof bolts. Given these efforts to support the roof adequately, we cannot conclude that simply because four of these roof bolts had missing plates Emery exhibited aggravated conduct exceeding ordinary negligence. Cf. Westmoreland Mining Co., 7 FMSHRC at 1342.

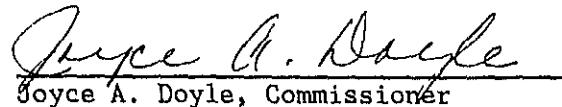
Accordingly, we hold that the violation of section 75.200 was not caused by Emery's unwarrantable failure. We reverse the judge's contrary finding and modify the section 104(d)(1) citation to a citation issued pursuant to section 104(a). 30 U.S.C. § 814(a).



Ford B. Ford
Ford B. Ford, Chairman



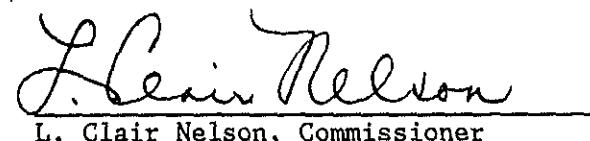
Richard V. Backley
Richard V. Backley, Commissioner



Joyce A. Doyle
Joyce A. Doyle, Commissioner



James A. Lastowka
James A. Lastowka, Commissioner



L. Clair Nelson
L. Clair Nelson, Commissioner

Distribution

Timothy M. Biddle, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Henry Chajet, Esq.
American Mining Congress
1920 N Street, N.W.
Suite 300
Washington, D.C. 20036

Administrative Law Judge John Morris
Federal Mine Safety and Health Review Commission
333 West Colfax Avenue, Suite 400
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 11, 1987

YOUGHIOGHENY & OHIO COAL COMPANY	:	
v.	:	Docket Nos. LAKE 86-21-R
	:	LAKE 86-30-R
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 86-56
YOUGHIOGHENY & OHIO	:	
COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), the issues are whether Commission Administrative Law Judge Gary Melick erred in concluding that two violations of a mandatory safety standard were the result of Youghiogheny and Ohio Coal Company's ("Y&O") "unwarrantable failure" within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1); whether the two violations were of a "significant and substantial" nature; and whether the procedure followed by the judge in assessing civil penalties for the violations was proper. 1/ For the

1/ Section 104(d)(1) states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of

reasons that follow, we affirm the judge's unwarrantable failure findings and one of the two significant and substantial findings, but reverse as to the other significant and substantial finding and remand that matter for reconsideration of the civil penalty.

I.

Y&O's Nelms No. 2 Mine, an underground coal mine, is located in Harrison County, Ohio. On Friday, October 25, 1985, Inspector Franklin Homko of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Y&O a citation for failure to comply with the mine's approved roof control plan in violation of 30 C.F.R. § 75.200. ^{2/} The citation charged non-compliance with the plan's requirements for temporary roof supports in the face areas of the A entry, D entry, and

such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

^{2/} 30 C.F.R. 75.200, which restates section 302(a) of the Mine Act, 30 U.S.C. § 862(a), provides in part:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form.... The plan shall show the type of supported spacing approved by the Secretary.

the D to E crosscut in the No. 3 section. This citation was not contested. The following Monday, October 28, 1985, the inspector returned to the mine and found that the conditions leading to the October 25 citation had been corrected and that mining had advanced in the A and D entries and in the D to E crosscut. However, the inspector again found that temporary roof supports in these areas did not comply with the roof control plan and therefore violated section 75.200. The inspector further found that the violation resulted from Y&O's unwarrantable failure to comply with the cited standard and that it constituted a significant and substantial violation. Therefore, the inspector issued a section 104(d)(1) order of withdrawal (Order No. 2823806).

Subsequently, on November 19, 1985, the inspector conducted an inspection of the No. 5 section. The entries in the No. 5 section had been advanced by a continuous mining machine ("continuous miner") and cuts had been made in the sides of the entries at an obtuse angle ("fan cuts"). The inspector observed that a fan cut on the right side of one of the entries had cut into a corresponding fan cut on the left side of the adjacent entry. The roof in the area created by this "hole through" was unsupported. The inspector found that in making the "hole through" into an area where the roof was not supported, Y&O violated its approved roof control plan. Accordingly, the inspector cited Y&O for a violation of section 75.200, made unwarrantable failure and significant and substantial findings, and issued an order of withdrawal pursuant to section 104(d)(1) (Order No. 2823831).

Following an evidentiary hearing, the judge found that the violations occurred, were "unwarrantable" and "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act, and assessed civil penalties of \$800 and \$500 for the violations. 8 FMSHRC 948 (June 1986)(ALJ). In determining that the temporary roof support violation (Order No. 2823806) was the result of Y&O's unwarrantable failure to comply with section 75.200, the judge concluded that "the repetition of the same type of violation within such a short time shows indifference or lack of due diligence or reasonable care." 8 FMSHRC at 954. The judge held that Y&O "should have known" of the violation. *Id.* The judge found that the "hole through" violation (Order No. 2823831) was attributable to unwarrantable failure for the same reason. 8 FMSHRC at 954.

On review Y&O does not challenge the findings of violation, but argues that the judge applied an incorrect legal standard in determining that the violations resulted from unwarrantable failure on its part. Y&O's arguments are virtually identical to those of the operator in Emery Mining Co., 9 FMSHRC ___, slip op. at 3, WEST 86-35-R (December 11, 1987), a case that we also decide today. Y&O argues, as did the operator in Emery, that the judge's decision construes unwarrantable failure as equivalent to ordinary negligence. It asserts that this result is erroneous because it conflicts with the carefully balanced enforcement scheme of the Act and distorts the proper focus of section 104(d). We agree.

II.

In Emery, we concluded that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act. Emery, slip op. at 1, 8. This conclusion was based on the ordinary meaning of the term "unwarrantable failure," the purpose of unwarrantable failure sanctions within the Mine Act, and the relevant legislative history and judicial precedent. We stated that whereas negligence is conduct that is "inadvertent," "thoughtless," or "inattentive," unwarrantable conduct is conduct that is described as "not justifiable" or "inexcusable". Only by construing unwarrantable failure by a mine operator as aggravated conduct constituting more than ordinary negligence, do unwarrantable failure sanctions assume their intended distinct place in the Act's enforcement scheme. Emery, slip op. at 5.

We noted that section 104(d) is an integral part of the Mine Act's enforcement scheme, a scheme that, as an incentive for operator compliance, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." Emery, slip op. at 4 (quoting Cement Division, National Gypsum Company, 3 FMSHRC 822, 828 (April 1981)). We further observed that in the Mine Act unwarrantable failure is but one description of the type of operator conduct that evokes particular sanctions. We concluded that the Mine Act's use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a graduated enforcement scheme. Emery slip op. at 5. We noted further the insistence of the Secretary that equating ordinary negligence with unwarrantable failure "grossly mischaracterize[s]" his position, and that our construction of unwarrantable failure to mean aggravated conduct constituting more than ordinary negligence is fully consistent with the manner in which the Secretary enforces the Mine Act. Emery, slip op. at 5, 6.

Finally, we found that construing unwarrantable failure consonant with its ordinary meaning and based upon the purpose of the Act's unwarrantable sanctions was in substantial harmony with the legislative history and judicial precedent bearing on the provision. Emery, slip op. at 7-8. Consequently, we held that unwarrantable failure means aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act.

III.

Applying this conclusion to the case at hand, we hold that substantial evidence supports the judge's findings that the violations at issue were the result of Y&O's unwarrantable failure to comply with section 75.200.

The judge's finding that the temporary roof support violation (Order No. 2823806) was attributable to unwarrantable failure was premised upon the fact that the inspector had cited a similar violation of section 75.200 in the same area on October 25, only three days before the issuance of Order No. 2823806. In addition, the judge noted that

preshift examinations of the affected area were conducted but that the violative conditions had not been reported. 8 FMSHRC at 950-51. Y&O argues that the temporary roof supports of the last row in the A entry were only 7, 10, and 2 inches in excess of the maximum distance to the faces. Y&O also argues that it had directed experienced miners to correct the previous violation but that for "unknown reasons they bolted and repositioned temporary supports incorrectly". Y&O Br. 2. 3/

The inspector testified that during 1985 there were 17 roof falls at the mine and that two occurred on the No. 3 section. This history of roof falls placed Y&O on notice that heightened scrutiny to assure compliance with its roof control plan was vital. Given the prior violation of section 75.200 in the same area of the mine only days before the violation at issue occurred and the extent of the violative condition, we find that Y&O's conduct in relation to the violation was more than ordinary negligence and that substantial evidence supports the judge's conclusion that the violation resulted from Y&O's unwarrantable failure.

Regarding the "hole through" violation (Order No. 2823831), the judge based his unwarrantable failure finding upon the fact that the roof control plan, without exception, prohibits cutting through to areas in which the roof is not supported adequately. Yet in this case Y&O's section foreman, who was at the controls of the continuous miner, nonetheless cut through into an area of unsupported roof. 8 FMSHRC at 954. Y&O argues that the "hole through" was not deliberate but accidental. Y&O Br. 7. This assertion is contradicted by the record. A member of Y&O's safety department testified that the "hole through" was done deliberately for ventilation purposes. Tr. 266, 285-87. In any event, even if the "hole through" were accidental, the roof control plan clearly prohibits cutting through into areas of unsupported roof and the section foreman is responsible for compliance with the plan. In discharging this important responsibility the section foreman is held to a "demanding standard of care in safety matters." Wilmot Mining Co., 9 FMSHRC 684, 688 (April 1987) Here, the section foreman's conduct in "holing through" did not meet that standard and demonstrated a serious lack of reasonable care, exceeding ordinary negligence and constituting an unwarrantable failure to comply with section 75.200.

Regarding the significant and substantial nature of the temporary roof support violation (Order No. 2823806), the judge was persuaded by the testimony of the inspector that there existed a reasonable likelihood that the hazard contributed to by the violation would result in a partial or complete roof fall resulting in serious or fatal injuries. 8 FMSHRC at 950. We have held that a violation is properly designated significant and substantial "if, based on the particular

3/ The misplaced temporary supports in the A entry constituted only a part of the violation. There were other violative conditions. In the D entry there was one missing temporary support, and in the D to E crosscut there was one missing temporary support and one temporary support that was misplaced by 10 inches. On review Y&O does not address these conditions.

facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum, 3 FMSHRC at 825. In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), we explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id.

Y&O admits that it was not in compliance with its roof control plan. The evidence establishes that the discrete safety hazard contributed to by the violation was the danger of a roof fall. The issue is whether there was a reasonable likelihood that the hazard contributed to would result in an event in which there is an injury. The improperly supported roof was in the face areas of the No. 3 section and additional mining was planned in those areas. Continued normal mining operations would bring miners under the inadequately supported roof. Lawrence Wehr, a member of Y&O's safety staff, conceded that miners in the cited area would be subject to danger. Tr. 135-37, 138-41. Given the history of unstable roof at the Nelms No. 2 mine and the fact that continued normal mining operations would endanger miners, an injury causing roof fall was reasonably likely. Therefore, substantial evidence supports the administrative law judge's finding that this violation was of a significant and substantial nature.

In concluding that the "hole through" violation (Order No. 2823831) was of a significant and substantial nature, the judge relied upon the testimony of the inspector who stated that the "hole through" exposed a large area of unsupported roof and presented a significant roof fall hazard. 8 FMSHRC at 954. Although the Secretary established that the "hole through" constituted a violation of section 75.200 and that the violation contributed to the danger of a roof fall, we conclude that substantial evidence does not support a finding that there was a reasonable likelihood that a roof fall would result in an injury.

It is undisputed that the section foreman operating the continuous

mining machine was under supported roof at all times when he made the fan cuts and the "hole through." Tr. 230, 241, 246, 268, 273-74. It also is undisputed that Y&O was not going to mine further the rooms involved; these were the last cuts. Thus, had normal mining operations continued, no miners would have entered the rooms in which the "hole through" occurred. In addition, Y&O posted danger signs at the entrance to the rooms leading to the "hole through." In light of these facts, we hold that substantial evidence does not support the judge's conclusion that the violation significantly and substantially contributed to a mine safety hazard.

Finally, we turn to the penalty aspects of the case. Y&O contends that in proposing civil penalties for the violations, the Secretary did not adhere to his penalty regulations. (30 C.F.R. Part 100) and that a remand to the Secretary is therefore necessary. Similar arguments by Y&O were addressed in detail by the Commission in another decision issued while the present case was pending on review. Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 679-80 (April 1987). As explained in this prior decision, the Commission possesses explicit statutory authority to assess an appropriate penalty based on the record evidence developed before it pertaining to the statutory penalty criteria of section 110(i). 30 U.S.C. § 820(i). The Commission's penalty assessments are subject to judicial review. Because the record developed in an adversarial proceeding concerning the statutory penalty criteria will invariably be more complete and fairly balanced than the information normally available to the Secretary when he unilaterally proposes a civil penalty, no compelling legal or practical purpose would be served by requiring the Secretary to repropose a penalty after a hearing in a civil penalty proceeding has been concluded. Here, a full evidentiary hearing has been held and the judge has assessed civil penalties based on the evidence. Therefore, as in the prior case, the proper course is to review the judge's penalty assessment to determine whether it is supported by the record.

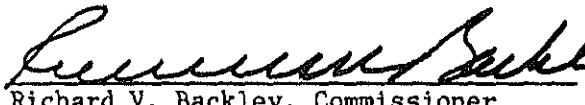
In assessing a civil penalty of \$500 for the "hole through" violation (Order No. 2823831) the judge considered his finding that the violation was significant and substantial but did not expressly refer to the gravity of the violation. 8 FMSHRC at 954. Although the penalty criterion of "gravity" (30 U.S.C. § 820(i)) and the significant and substantial nature of a violation (30 U.S.C. §814(d)) are not identical, they are based frequently upon the same or similar factual considerations. Quinland Coals, Inc., 9 FMSHRC 1614, 1622 n. 11 (September 1987). Since we have determined that the "hole through" violation was not of a significant and substantial nature, we remand to the judge to examine the gravity of the violation in light of this determination and to assess an appropriate civil penalty.

V.

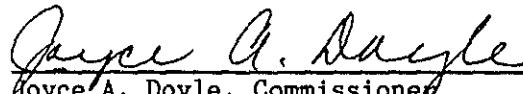
Accordingly, we affirm the judge's unwarrantable failure findings for both violations and the judge's significant and substantial finding with respect to the temporary roof support violation (Order No. 2823806). We vacate the judge's significant and substantial finding and civil penalty assessment for the "hole through" violation (Order No. 2823831) and remand that matter for reconsideration of the civil penalty.



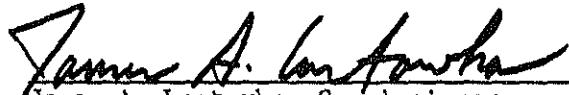
Ford B. Ford, Chairman



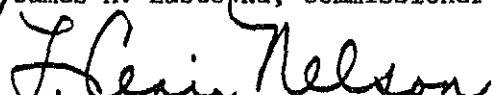
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

Distribution

Robert C. Kota, Esq.
Youghiogheny & Ohio Coal Company
P.O. Box 1000
St. Clairsville, Ohio 43950

Vicki Shter-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 21, 1987

AUSTIN POWER, INC.	:	
	:	
v.	:	Docket Nos. CENT 86-59-R
	:	CENT 86-60-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	CENT 86-61-R
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 86-40
	:	
AUSTIN POWER, INC.	:	

BEFORE: Chairman Ford; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Backley, Lastowka and Nelson, Commissioners

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the issues presented include whether Commission Administrative Law Judge George A. Koutras erred in holding that Austin Power, Inc. ("Austin Power"), violated two surface coal mine safety standards: 30 C.F.R. § 77.1607(g) requiring equipment operators to be certain that all persons are clear before starting or moving equipment 1/ and 30 C.F.R. § 77.1710(g) mandating that employees be required to wear safety belts and

1/ 30 C.F.R. § 77.1607(g) provides:

Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.

lines where there is a danger of falling. 2/ 8 FMSHRC 1671 (November 1986)(ALJ). The Commission granted Austin Power's petition for discretionary review. For the reasons that follow, we reverse the judge's conclusion that Austin Power violated section 77.1607(g) and affirm his finding that Austin Power violated section 77.1710(g).

This case arises out of a fatal accident that occurred on August 19, 1985, at the Big Brown Strip Mine located in Freestone County, Texas. The mine is a surface coal mine owned and operated by Texas Utilities Company. Austin Power is an independent contractor and was engaged in erecting a cross-pit spreader at the mine. The spreader is an extremely large piece of tracked equipment that removes top soil from the area to be mined. Two separate conveyor belt booms extend horizontally from the spreader at different heights. The higher 70-meter conveyor belt boom and the lower 20-meter conveyor belt boom are designed to receive and transport topsoil that has been removed from the ground by the spreader's digging apparatus. Opposite these conveyor belt booms, another conveyor belt boom for discharging the topsoil extends horizontally from the spreader.

On the day of the events at issue, the electrical power to the spreader had not been connected and the booms were unable to be moved on their own. The 20-meter boom had been released from its shorings underneath the 70-meter boom and had been moved by a 518 Link-Belt crane laterally from west to east, so that five counterweights, each approximately 24,000 pounds in weight, could be installed. The counterweights balance the boom when in operation. In order to install the counterweights, two separate cranes were used. The 518 Link-Belt crane was connected to the receiving end of the 20-meter boom. The other crane, which was used to load the counterweights at the boom's discharge end, was near the boom's fulcrum.

After the loading of the counterweights was completed, the 20-meter boom was to be repositioned under the 70-meter boom. It was determined that the 518 Link-Belt crane's boom could not pass under the 70-meter boom and, as a result, could not complete the procedure of repositioning the 20-meter boom underneath the 70-meter boom. Therefore, a cherry picker on the other side of the 70-meter boom was to swing the 20-meter boom from the point beyond which the crane could no longer proceed to the proper location under the 70-meter boom. Three employees of Austin Power were assigned to attach a wire-rope choker to the end of the 20-meter boom for the purpose of hooking it to the cherry picker. The three employees walked to the end of the 20-meter boom's covered walkway and stood on the walkway while the boom was being moved by the crane. The walkway was 36 feet above the ground and was equipped with guardrails and floor plates of metal grating.

2/ 30 C.F.R. § 77.1710 provides in part:

Each employee working in a surface coal mine ...
shall be required to wear protective clothing and
devices as indicated below: ...

(g) Safety belts and lines where there is danger of
falling....

The three employees were wearing safety belts, but they did not "tie off," i.e., attach their lines to the boom.

One of Austin Power's employees, Steve Smith, was in the process of attaching the choker to the walkway frame near the end of the 20-meter boom while the other two employees were standing behind him. A rigging foreman for Austin Power, James Patterson, was on the ground, 35-40 feet from the end of the boom, observing the employees. While Smith was attaching the choker, an eyelet connecting a hydraulic device at the opposite end of the 20-meter boom broke. The eyelet failure caused the end of the boom to jerk suddenly upwards in a "whiplash" motion. The three employees were propelled off the boom, and the metal floor grating separated from the walkway and fell to the ground. Smith fell to his death. The other two employees grabbed onto part of the boom as they fell and were not injured.

The following day, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Donald Summers, arrived at the mine to investigate the accident. As a result, Summers issued citations alleging violations of sections 77.1607(g) and 77.1710(g). Summers charged that because Smith and the other two employees were on the 20-meter boom while it was being moved by the crane, the crane operator "was not certain that all persons were in the clear before he put his machine into operation" and, consequently, that Austin Power had violated section 77.1607(g). Govt. Ex. P-1. Summers also charged that under 77.1710(g) the employees on the boom were required to have tied off their safety belts since they were exposed to a danger of falling. In addition, Summers found that both violations were "significant and substantial" and that Austin Power was negligent. The Secretary proposed civil penalty assessments in the amount of \$3,000 for each violation.

At the hearing before Judge Koutras, the Secretary contended that as applied to the facts of this case, section 77.1607(g) required the crane operator before starting or moving the crane to be certain that persons were not only clear of the crane, but also not on the crane's load, here the 20-meter boom. As to section 77.1710(g), the Secretary and the MSHA inspector conceded at the hearing that the two other employees present on the boom, but not involved in the actual installation of the choker, were not required to wear safety belts and to tie off. However, the Secretary asserted that a reasonable employer would have required Smith to tie off when assigning him to a task that required him to place his body between guardrails on an elevated walkway thereby creating a danger of falling. Austin Power responded that section 77.1607(g) did not apply to the circumstances that existed at the time of the accident. Austin Power argued that the employees were not riding the "load" of the crane and, in any event, were in the clear because the very design and purpose of the 20-meter boom was to permit employee access. Austin Power further argued that section 77.1710(g) was not applicable, since working on the 20-meter boom did not involve a hazard of falling. Also, it argued that its employees were required to wear safety belts and lines where there was a danger of falling as evidenced by its safety rules.

The judge rejected Austin Power's arguments. He determined that section 77.1607(g) applied to the three employees "while on the moving boom which was being lifted and maneuvered about during the course of the

workshift in question." 8 FMSHRC at 1716. He accordingly found that the crane operator had a duty to be certain that the employees were clear of the boom before the crane was ready to move the boom, that this duty was not met, and that section 77.1607(g) was therefore violated. Id. In concluding that Austin Power also violated 30 C.F.R. § 77.1710(g), the judge found that Smith's position on the walkway while in the process of installing the choker placed him in danger of falling. 8 FMSHRC at 1719-22. The judge found that "it should have been clear to a reasonably prudent person that a danger of falling existed and that Smith should have tied off." 8 FMSHRC at 1722. The judge rejected Austin Power's argument that its work rules regarding use of safety belts where a danger of falling is present were adequate to defeat the violation in this case. He found that an employee of Austin Power could reasonably have concluded that he was not required to tie off while performing work in an elevated walkway protected by handrails, 36 feet off the ground. 8 FMSHRC at 1724-25.

Finally, the judge concluded that the violations were "significant and substantial," and were the result of Austin Power's negligence. The judge assessed civil penalties of \$2,000 and \$2,500, respectively, for the violations. Austin Power challenges the judge's findings and conclusions regarding both violations.

We hold that section 77.1607(g) requires the operator of equipment subject to the standard to be certain that all persons within the potential zone of danger are clear from reasonably foreseeable hazards resulting from the starting or moving of the equipment. We agree with the judge that the standard applied to the crane operator, but hold that the Secretary did not establish that the crane operator failed to make certain that all persons, including the three employees on the boom's walkway, were clear before he started or moved the equipment. Accordingly, we find no violation of the standard.

As contrasted with more detailed regulations, the requirement of section 77.1607(g) that "[e]quipment operators be certain ... that all persons are clear before starting or moving equipment" is the kind of regulation made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Generally, the adequacy of an equipment operator's efforts to comply with section 77.1607(g) is evaluated in each case with reference to an objective test of what actions would have been taken by a reasonably prudent person familiar with the mining industry, relevant facts, and the protective purpose of the standard. See, e.g., United States Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); United States Steel Corp., 5 FMSHRC 3, 5 (January 1983); Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982). In this instance, such a determination requires consideration of what a reasonably prudent operator of the Link-Belt crane would have done under the circumstances to make certain that all persons were clear before he started or moved the crane.

Austin Power argues that the obvious purpose of the standard is to require an equipment operator to make certain that he does not hit bystanders with his equipment. According to Austin Power, the crane operator received proper signals and made certain that all bystanders were clear before starting or moving the crane and that the three employees were

clear because the crane could not come into contact with them.

A plain reading of section 77.1607(g) reveals that it does not limit the protection it affords to any particular class of persons, such as bystanders. It refers to "all persons" being clear. In addition, the language does not suggest that the hazard with which the standard is concerned is limited to situations in which people might be run over or hit by the equipment itself. Rather, the standard protects all persons within the potential zone of danger from all reasonably foreseeable hazards resulting from the starting or moving of the equipment. Under the standard, therefore, it was the duty of the crane operator to make certain that all persons within the potential zone of danger were clear of reasonably foreseeable hazards before he started or moved his equipment.

In this case, the 518 Link-Belt crane was being used to reposition a boom on the cross-pit spreader. As an integral part of the repositioning operation, the three Austin Power employees were assigned to go to the walkway of the boom. The walkway was intended by its very design to permit the presence and passage of workers during the operation of the spreader. Although the crane was to apply force to the boom in order to effectuate a lateral movement, the three employees were clear of any reasonably foreseeable hazard posed by that movement. They were on a covered walkway that was protected by a fall protection system consisting of a top rail, mid-rail, and toe-board. Further, movement of the boom and its attached walkway was anticipated in the design and function of the spreader. The crane operator knew that the employees were on the walkway to transfer the 20-meter boom from his crane to the cherry picker on the opposite side and the employees knew that the boom was to be moved. The crane operator testified that he moved the rig upon receiving a signal from ground personnel. Tr. 154. The crane operator also testified that throughout the day of the accident he received signals and instructions from supervisory personnel. Tr. 133. Before the crane actually began to reposition the boom, the project general superintendent was actively involved in issuing instructions to the employees on the boom and to ground personnel. Tr. 249. James Patterson, the rigging foreman, was on the ground underneath the boom supervising the three employees and flagging the crane operator. Tr. 203. Thus, the crane operator was aware of the presence of the three employees on the protected walkway, was receiving signals, and made a determination that all persons were clear of any reasonably foreseeable danger resulting from the starting or moving of his equipment. Tr. 144. The record contains no proof that any of the employees on the walkway was in an unprotected position at the time the crane operator began to reposition the boom. Smith's attempt to attach the choker for hooking onto the cherry picker, placing him in a danger of falling as discussed below, appears to have occurred after the Link-Belt crane had begun to move the boom. Therefore, we find that the crane operator acted as a reasonably prudent person in similar circumstances would have and, therefore, met the duty imposed by the standard. Consequently, we conclude that there is insufficient evidence to support the judge's finding of violation of section 77.1607(g).

In concluding that Austin Power violated section 77.1710(g), which provides that employees "shall be required to wear ... safety belts and lines where there is a danger of falling," the judge determined that Smith

was in danger of falling while attempting to attach the choker and he found the substance and enforcement of Austin Power's safety rules regarding the wearing of safety belts and lines to be lacking. 8 FMSHRC at 1722-25. In Great Western Electric Co., 5 FMSHRC 840, 842 (May 1983), the Commission, construing the corollary safety belt standard applicable to underground metal and nonmetal mines, concluded that a danger of falling exists when "an informed reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." Further, in Southwestern Illinois Coal Corp., 5 FMSHRC 1672, 1675 (October 1983), the Commission concluded that section 77.1710(g) mandates that an operator establish a program requiring the wearing of safety belts and lines where dangers of falling exist and enforce the requirement diligently.

The administrative law judge concluded that in the circumstances of the present case a reasonably prudent person would have recognized that a danger of falling existed and that Smith should have tied off. Our task on review is to determine whether substantial evidence supports the judge's finding. 30 U.S.C. § 823(d)(2)(A)(ii)(I). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). As recited by the judge, the evidence establishes that while attempting to attach the choker, Smith was on his knees near the end of the boom, reaching under the middle railing of the guardrail with at least his head outside the railing. 8 FMSHRC at 1722. His hands were occupied with swinging the choker cable under the walkway from one side and catching it on the other. This was occurring in a location 36 feet above ground. Given the circumstances and the work Smith was performing, we conclude that a reasonably prudent person would have recognized a danger of falling and would have tied off. Consequently, we hold that substantial evidence supports the finding of a violation of section 77.1710(g).

The judge also addressed Austin Power's safety rules concerning the use of safety belts and lines. The judge held that the safety rules were inadequate because under those rules an employee working 36 feet above ground on an elevated walkway protected by handrails could conclude that he was not required to tie off. In addition, the judge found the safety rules to be inadequate because under circumstances in which the employee reaches through the railings, the decision to tie off is left to the discretion of the employee. 8 FMSHRC at 1724-25. We agree with the Secretary that consideration of Austin Power's rules was unnecessary to a disposition of the case. In Southwestern, in response to the Secretary's argument that an operator must guarantee the wearing of safety belts, the Commission stated that "when an operator requires its employees to wear belts when needed and enforces that requirement, it has discharged its obligation under the regulation." 5 FMSHRC at 1675. In the instant case, the controlling issue is whether safety belts and lines were "needed," that is, whether there was a danger of falling, not whether Austin Power's program requiring the use of safety belts and lines was adequate. Austin Power did not regard Smith's failure to tie off under the circumstances he faced as a violation of its rules and policies because, in its view, no danger of falling was presented. The rigging foreman testified that Smith was not required to tie off, Tr. 197, and this argument has been vigorously advanced on review. The issue of the adequacy of an operator's program and its enforcement is only relevant when an operator contends that an employee violated the

requirements of its program due to the employee's disobedience or negligence. Southwestern, 5 FMSHRC at 1675 (quoting North American Coal Corp., 3 IBMA 93, 107 (April 1974)). Because Austin Power does not contend that Smith violated its safety rules or that he was disobedient or negligent, but insists that Smith was not required to be tied off, Southwestern Illinois is inapposite. We conclude that substantial evidence supports the judge's finding that a danger of falling was present and we affirm his finding of a violation of section 77.1710(g).

Finally, we affirm the judge's finding that the violation of section 77.1710(g) was "significant and substantial" and was the result of Austin Power's negligence. A violation is properly designated significant and substantial "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); Youghiogheny & Ohio Coal Co., 9 FMSHRC 673, 677 (April 1987); see also, Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1078-79 (D.C. Cir. 1987). In Mathies Coal Co., supra, 6 FMSHRC at 3-4 (January 1984), we explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

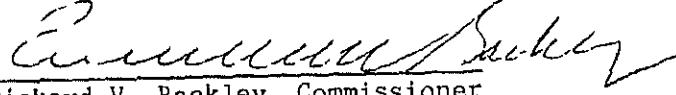
The third element requires the Secretary to establish a reasonable likelihood that the hazard contributed to will result in an injury producing event. Furthermore, it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984), and the violation itself "must be evaluated in terms of continued normal mining operations." Youghiogheny & Ohio, 9 FMSHRC at 677-78; U.S. Steel Mining Co., Inc., 6 FMSHRC 1575, 1574 (July 1984).

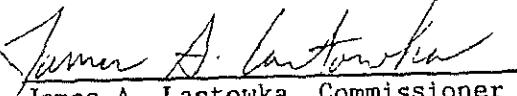
The discrete safety hazard contributed to by the violation of section 77.1710(g) was the danger of falling. Based on the evidence recited above describing Smith's position on his knees with at least his head beyond the guardrails while attempting to attach the choker while 36 feet above ground, we conclude that even if the work had proceeded normally, a fall under the circumstances was reasonably likely. Accordingly, we affirm the judge's finding that the violation was of a significant and substantial nature.

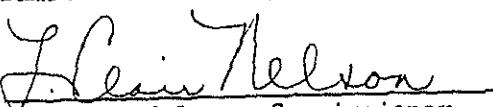
Regarding the judge's finding of negligence in connection with this violation, the rigging foreman was directly supervising Smith's work from the ground and was able to observe Smith's body position and efforts to attach the choker. Tr. 195-97, 203. We agree with the judge that with the exercise of reasonable diligence, the foreman should have recognized the

falling hazard to which Smith was exposed and should have instructed Smith to tie off. 8 FMSHRC 1730. The negligence of the foreman was properly imputed to the operator in determining the amount of civil penalty. Wilmot Mining Co., 9 FMSHRC 684, 687 (April 1987); Southern Ohio Coal Co., 4 FMSHRC 1459, 1463-64 (August 1982).

Accordingly, we reverse the judge's finding that Austin Power violated section 77.1607(g) and vacate the civil penalty assessed by the judge for the violation. In addition, we affirm the violation of section 77.1710(g) and the civil penalty assessed.


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner


E. Clair Nelson, Commissioner

Chairman Ford and Commissioner Doyle, concurring in part and dissenting in part:

We join in the majority's decision to the extent that it reverses the administrative law judge's finding that Austin Power, Incorporated violated section 77.1607(g) and vacates the civil penalty assessed by the judge for that violation. We would, however, reverse the judge on a more basic ground, viz. that the standard does not apply to the facts presented in this case. We also respectfully dissent from the decision to the extent that it affirms the judge's finding of a violation of section 77.1710(g) and the civil penalty assessed for that alleged violation.

30 C.F.R. §77.1607(g) provides:

Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.

The Secretary asserts that this standard prohibits any employees from being on the boom of the spreader at any time while it is being moved. Tr. 46, 69, 257. We believe that the plain meaning conveyed to a person of ordinary intelligence by the standard as drafted is far closer to that articulated by the crane operator at the hearing: "[I]t is your responsibility not to jump into a rig, crank it up and run over the mechanic that is changing your oil." Tr. 154. The hazard addressed in the crane operator's statement is that posed by self-propelled mobile equipment that is capable of injuring pedestrians or operators of nearby equipment who are not adequately forewarned of a start up or movement. Thus, the 518 Link-Belt crane operator was responsible for seeing that the ground around the crane and the path it was to take were clear before starting or moving the crane. His testimony indicates that he took those actions.

Section 77.1607(g) has been placed in Subpart Q - Loading and Haulage and contains as its own heading: "Loading and haulage equipment; operation." The record contains no evidence of the history or purpose of the section nor does it contain evidence of prior enforcement actions by the Secretary that would have put the operator on notice that this regulation prohibited anyone from being on the cross-pit spreader's boom at any time while it was being moved by the Link-Belt crane. On the contrary, another section within Subpart Q, subsection 77.1601(c), specifically deals with "Transportation of persons; restrictions" and specifically limits and prohibits riding or being transported outside the cabs and beds of mobile equipment, with no mention being made of the type

of equipment at issue in this case. Further, section 77.1607(f) requires persons to notify the equipment operator before they get on or off loading and haulage equipment.

All of this leads us to the conclusion that, if it were the Secretary's intention to enjoin persons from riding on this spreader boom at any time that it was in motion, that intention was not adequately expressed in section 77.1607(g). See Phelps Dodge Corporation v. FMSHRC, United Steelworkers of America, AFL-CIO, Local Union 616, Intervenor, 681 F.2d 1189 (9th Cir. 1982). "Laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Alabama By-Products, 4 FMSHRC 2128, 2129 (December 1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)).

The majority, in finding coverage by the standard, characterizes it as one that is made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). However, such broad standards must afford reasonable notice of what is required or proscribed. United States Steel Corp., 5 FMSHRC 3, 4 (January 1983). We do not disagree that the adequacy of the operator's efforts to comply with those standards that are designed to cover myriad circumstances is to be evaluated in each such case with reference to those actions that would have been taken by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purposes of the standard. However, in this case, the Secretary's position permits absolutely no latitude or discretion but, rather, asserts a very specific requirement: that no one be permitted on the boom of the cross-pit spreader while it is moving. If the Secretary's requirement is so specific, he could have, and should have, said so. See Diamond Roofing Co., Inc., 528 F.2d 645 (5th Cir. 1976). As the Commission has held previously, broad standards "cannot be applied in a manner that fails to inform a reasonably prudent person that the condition or conduct at issue [is] prohibited by the standard." Mathies Coal Co., 5 FMSHRC 300, 303 (March 1983). Safety standards, if they are to ensure safety to miners and prevent accidents, must put the operator on notice beforehand of what is required of him.

We also dissent from the majority's affirmance of a violation by Austin Power of 30 CFR §77.1710(g) because the record fails to provide substantial evidence to support the judge's finding that a danger of falling existed.

30 CFR §77.1710(g) provides, in relevant part, as follows:

Each employee working in a surface coal mine ... shall be required to wear protective clothing and devices as indicated below: ...

(g) Safety belts and lines where there is danger of falling...

Immediately prior to the accident, three employees were situated along a covered walkway that was attached to the 20-meter boom of the cross-pit spreader. The walkway was equipped with a guardrail that consisted of a top rail approximately 42 inches above the walkway surface, a mid rail and a toe board. The fatal accident occurred when an eyelet on the spreader broke and caused the 20-meter boom to jerk upwards, propelling the three employees upward from the walkway into the air. One of the employees, Steve Smith, fell to his death while the other two managed to regain a hold onto the structure. After initially charging that all three employees were in danger of falling, the Secretary conceded at the hearing that only Steve Smith was in danger of falling prior to the accident and, therefore, required to wear a safety belt and be tied off. The basis for the Secretary's allegation of violation was that Smith's work activity of installing a choker placed him in danger of falling. Therefore, analysis of whether Smith's work activity placed him in danger of falling must be made without consideration of the fact that Smith was propelled from the walkway as a result of the eyelet failure, an event totally unrelated to his installation of the choker and, by all accounts, totally unforeseeable.

Four witnesses testified on the issue of whether Smith's installation of the choker placed him in danger of falling. MSHA inspector Donald Summers, who participated in the investigation of the accident, testified that there was a need for Smith to have a safety belt and be tied off if he was performing work "outside" the handrail. Tr. 105. However, Summers, who was not an eyewitness to the event and began the investigation two days after it occurred, did not testify as to whether, by being "outside" the handrail, he meant one's entire body, a portion of the torso, or any body part extending beyond the handrail. The uncontradicted evidence was that Smith, who weighed 235 pounds, was on his knees installing the choker with only his hands and a portion of his head outside the railing, between the mid rail and the toe board. Tr. 163, 170, 171. Inspector Summers did not testify that this constituted being outside the railing, nor did he offer his opinion as to how Smith's actions would have put him in danger of falling. As mentioned, the inspector did not believe it was necessary to be tied off at all times when one was on the walkway. Indeed, Inspector Summers had traveled the very walkway in issue without being tied off with a safety line. Tr. 103-105.

The second witness was Russell Crowell, the operator of the 518 Link-Belt crane that was being used to move the spreader's 20-meter boom. Crowell was unable to observe Smith's position on the walkway at the time of the accident, but he testified that he and Smith had worked extensively on the spreader and he knew that Smith's practice was to tie off whenever there was a risk of falling. Tr. 143.

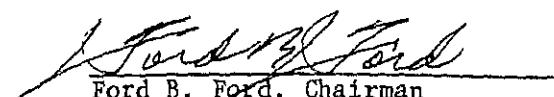
Jeffrey Arent, the third witness, was an eyewitness to the event, and was located on the same walkway as Smith when the eyelet failed. He testified that Smith was kneeling on the walkway at the time of the accident with his head "just barely out" and his hands "out there" (i.e. outside the guardrail) Tr. 163. Mr. Arent believed there was no need to tie off under those circumstances. Tr. 173.

The last witness, James Patterson, rigging foreman at the site, was also an eyewitness. At the time of the accident he was on the ground some 35 to 40 feet from the end of the 20-meter boom. He observed Smith kneeling on the walkway, putting the choker around the framework. In his opinion Smith was not in danger of falling while performing that work. Tr. 197.

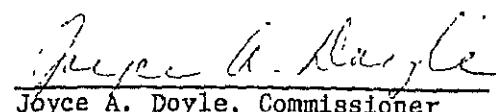
In order to establish substantial evidence that a danger of falling existed, the record must do more than create a suspicion of the existence of that fact. Rivas v. Weinberger, 475 F.2d 255, 257 (5th Cir. 1973). Anything in the record that "fairly detracts" from the weight of the evidence must also be considered and a finding should not be sustained "merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn..." Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

In this case, the testimony of the two eyewitnesses to the event, Arent and Patterson, that they did not believe that Smith's extension of his hands and part of his head beyond the guardrail placed him in any danger of falling, when coupled with the testimony of the crane operator that Smith was a careful individual who used his safety belt and line when exposed to a falling hazard, results in a record that provides formidable evidence that Smith was not exposed to such a hazard when he was installing the choker. This evidence must be considered along with the testimony of inspector Summers who was not at the scene at the time of accident, only 'understood' what Smith's position was while installing the choker, did not elaborate as to what he meant by being 'outside' the handrails and did not explain how Smith's actions would put him in danger of falling. Considering the entire record, we believe it fails to provide substantial evidence that a danger of falling existed prior to the totally unrelated, unforeseeable event of the eyelet failure.

There being no evidence to support the finding, the judge's determination that "Mr. Smith's position on the walkway while in the process of installing the choker in question placed him in danger of falling" is without foundation. 8 FMSHRC 1671, 1722 (November 1986). Similarly, the judge's statement that the railing afforded Smith "little protection and that he [Smith] could have lost his balance while attempting to swing the choker under the walkway and fallen to the ground" are conclusions unsupported by the record. Id. at 1722. Accordingly, we would vacate the finding of a violation of 30 CFR §77.1710(g).



Ford B. Ford, Chairman



Joyce A. Doyle, Commissioner

Distribution

Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Jennifer A. Youpa, Esq.
Steven R. McCown, Esq.
Jenkens & Gilchrist
3200 Allied Bank Tower
Dallas, Texas 75202

Administrative Law Judge George Koutras
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 23, 1987

UTAH POWER & LIGHT CO., MINING DIVISION	:	Docket Nos. WEST 87-130-R through WEST 87-163-R
v.	:	WEST 87-243-R through WEST 87-249-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

Utah Power & Light Co., Mining Division ("UP&L") has petitioned the Commission for interlocutory review of an order issued in these proceedings by Commission Administrative Law Judge John J. Morris denying UP&L's motion for summary decision. Respondent Secretary of Labor and Intervenor United Mine Workers of America ("UMWA") oppose the petition. Upon consideration of the petition and oppositions, the petition is denied for the reasons set forth below.

On March 24, 1987, as a result of an investigation by the Department of Labor's Mine Safety and Health Administration ("MSHA") of a fire and loss of life at the Wilberg Mine in December 1984, the Secretary issued numerous citations and orders to "Emery Mining Corp., and its successor-in-interest Utah Power & Light Co., Mining Division." At the time of the fire, the Wilberg Mine was owned by UP&L but, pursuant to contract, was being operated for UP&L by Emery Mining Corporation ("Emery"). On April 16, 1986, UP&L purchased Emery's assets and assumed direct operation of the Wilberg Mine.

UP&L contested the citations and orders issued to it by the Secretary asserting that it was "not liable for the violation[s] as Emery's successor-in-interest." The Secretary filed general answers to UP&L's notices of contest, denying all allegations contained in the contests.

On May 22, 1987, during the course of pre-hearing proceedings, UP&L filed a motion for summary decision pursuant to Commission Procedural Rule 64, 29 C.F.R. § 2700.64, arguing that, as a matter of law, it was not liable as a successor-in-interest for the violations alleged in the citations and orders. The Secretary filed a response and cross-motion for summary decision, asserting that "UP&L can be held liable as either 'successor-in-interest' to [Emery] or independently as a mine operator for violations cited by [MSHA]" Sec. Response and Cross-Motion for Summary Judgment at 3.

In an unpublished order issued on August 5, 1987, the judge denied both motions. The only explanation given in the order for his denial was that "a genuine issue of fact concerns whether UP&L was in control of the Wilberg Mine at the time of the alleged violations." Order at 3 (August 4, 1987). On September 18, 1987, UP&L moved the judge for reconsideration, contending that the question of whether UP&L was in control of the Wilberg Mine, although possibly relevant to whether UP&L may be held liable as an operator, was irrelevant to whether UP&L was liable as Emery's successor-in-interest as charged in the citations and orders -- the sole issue raised in UP&L's motion for summary decision. Judge Morris denied the motion for reconsideration without explanation.

Commission Procedural Rule 74, 29 C.F.R. § 2700.74, sets forth the standard of review governing consideration of such petitions: The Commission, in its discretion, may grant interlocutory review "upon a showing that the [challenged] ruling involves a controlling question of law and that immediate review of the ruling may materially advance the final disposition of the proceeding." Because the Secretary has failed to articulate clearly the theory underlying his charges against UP&L, and because the judge's order does not state clearly the basis for his rulings on UP&L's motions, we are unable to determine whether the issue of UP&L's liability as a successor-in-interest involves a controlling question of law and whether interlocutory review will advance the final disposition of this case.

The record reveals that the contested citations and orders were issued to UP&L as Emery's "successor-in-interest." The record also reveals that the thrust of UP&L's defense to date is that it is not liable as a successor. In response to UP&L's motion for summary decision, the Secretary stated that UP&L also may be independently liable as an "owner-operator" (Sec. Response at 7), but the major focus of the Secretary's argument was that UP&L is liable as a successor-in-interest. Sec. Response 8-21. Additionally, in response to UP&L's motion for reconsideration the Secretary stated as follows:

Although the Secretary determined that Emery was properly cited as the operator and UP&L was properly cited as a successor-in-interest, we fully agree that UP&L exercised operator-type health and safety responsibilities under the Mine Act. Therefore, if it is determined by the judge that, based upon the facts, UP&L was a co-operator of the Wilberg Mine at the time of the cited violation, then the Secretary would accept that determination and would agree that such a determination would be a proper exercise of his authority.... The facts at the time of issuance supported, in the Secretary's view, citing UP&L, at least, as a successor-in-interest. However, after review, further evidence might support charging UP&L as a co-operator as well as a successor-in-interest.

Sec. Response at 3-4 (emphasis added). The Secretary further states in his opposition to UP&L's petition for interlocutory review that "[t]he fact that UP&L was cited as a successor does not mean that the judge may not hold it liable as an operator if the evidence supports such a finding." Sec. Opposition To Motion for Interlocutory Review 3 (emphasis added). The Secretary also argues that any defect in his pleadings may be corrected subsequently through Fed. R. Civ. P. 15(b) (amendments to conform to the evidence).

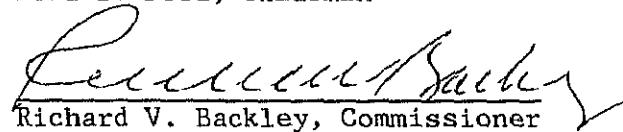
We regard the existing state of the Secretary's pleadings as unfocused and confused, providing neither UP&L nor the Commission with a clear statement of his asserted basis for imposing liability upon UP&L. The Secretary as prosecutor is responsible for charging violations under the Mine Act, not the Commission. As UP&L notes, the Secretary's theory for imposing liability will determine the nature of UP&L's defense to the allegations contained in the citations and orders. UP&L Petition for Interlocutory Review 4-5. To avoid any possibility of prejudice to UP&L, a clear articulation of the liability theory or theories that the Secretary is alleging and intends to pursue in this important litigation is required.

These proceedings are in a preliminary, prehearing stage. The Secretary must clarify the theory of liability upon which he intends to proceed. UP&L may, of course, renew or interpose whatever defenses or motions it deems appropriate. Finally, it is incumbent on the judge to fully explain the basis of his rulings on any such further motions.

Accordingly, the petition for interlocutory review is denied.



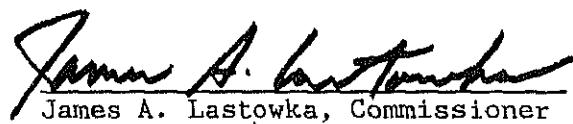
Ford B. Ford, Chairman



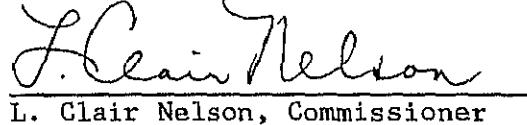
Richard V. Backley, Commissioner



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

Distribution

Timothy M. Biddle, Esq.
Thomas C. Means, Esq.
Kevin J. Darken, Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Paul H. Proctor, Esq.
Utah Power & Light Company
P.O. Box 899
Salt Lake City, Utah 84110

Colleen A. Geraghty, Esq.
James B. Crawford, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Michael Dinnerstein, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
333 West Colfax Avenue, Suite 400
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 29, 1987

HARLEY M. SMITH

v.

Docket Nos. KENT 86-23-D
KENT 86-84-D

BOW VALLEY COAL RESOURCES, INC. :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this discrimination case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (1982), a Joint Motion to Dismiss has been filed based on settlement. For the reasons set forth below, the motion is granted.

In decisions issued on April 14, 1987, and August 19, 1987, Commission Administrative Law Judge Avram Weisberger concluded that Bow Valley Coal Resources, Inc. ("Bow Valley"), had unlawfully discharged Complainant Harley M. Smith in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. §815(c)(1), and ordered Bow Valley to reinstate Mr. Smith and to pay him approximately \$52,880 in back pay plus interest, \$2,500 in attorney's fees, and miscellaneous costs. 9 FMSHRC 735 (April 1987) (ALJ); 9 FMSHRC 1468 (August 1987) (ALJ). Bow Valley filed a petition for discretionary review, which the Commission granted on September 25, 1987.

On October 28, 1987, we issued an order granting the complainant's motion to stay proceedings on review pending submission of a dismissal motion based on the parties' settlement of the case. On November 16, 1987, the Commission received a brief Joint Motion to Dismiss, stating that the parties "have reached an agreement which disposes of all issues raised herein." The motion was signed on behalf of Great Western Coal Inc. ("Great Western"), which was described as the "successor" to Bow Valley. The Commission administratively directed the parties to supplement the record by submitting the actual settlement agreement. Cf. Secretary of Labor on behalf of John Koerner v. Arch Mineral Coal Co., 1 FMSHRC 471 (June 1979). The Commission has now received that

agreement, which is signed by Smith, and certain additional information concerning the agreement.

Upon consideration of the record as supplemented, we approve the settlement and grant the dismissal motion. Accordingly, our direction for review is vacated and the proceeding is dismissed.

Ford B. Ford
Ford B. Ford, Chairman

Richard V. Backley
Richard V. Backley, Commissioner

Joyce A. Doyle
Joyce A. Doyle, Commissioner

James A. Lastowka
James A. Lastowka, Commissioner

L. Clair Nelson
L. Clair Nelson, Commissioner

Distribution

John C. Carter, Esq.
Smith & Carter
105 Central Street
Harlan, Kentucky 40831

Joshua E. Santana, Esq.
Brown, Bucalos, Santana & Bratt
201 West Short Street
Lexington, Kentucky 40507

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 1 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner : CIVIL PENALTY PROCEEDING
v. : Docket No. WEST 87-172
Rochelle Mine : A.C. No. 48-01353-03503 K48
TIC-THE INDUSTRIAL COMPANY OF
STEAMBOAT SPRINGS, INC.,
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
John L.C. Black, Esq., TIC-The Industrial Company
of Steamboat Springs, Inc., Steamboat Springs,
Colorado,
for Respondent.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., ("Mine Act"). The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges the operator of a coal mine with violating regulation 30 C.F.R. § 77.1401 which requires:

"Hoists and elevators shall be equipped with overspeed, overwind, and automatic stop controls and with brakes capable of stopping the elevator when fully loaded."

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of a civil penalty. The operator filed a timely appeal contesting the existence of the alleged violation and the amount of the proposed penalty.

Discussion

The Petitioner charges Respondent with using a "Grove crane RT 6205" (a mobile crane) as a manlift to hoist miners 60 feet up the side of the transfer building in a basket which was attached to the hoisting cable hook. The crane was not provided with overspeed, overwind, and automatic stop control.

It was Respondent's position that the hoisting standard cited does not apply to mobile cranes unless they are positioned over a shaft and used to lower and raise men or materials in the shaft. Respondent contends that § 77.1401 was intended to apply only to lifting devices used to raise or lower men or materials from or to an underground mine site and that the citation, therefore, was improperly issued. Respondent points out that the Dictionary of Mining, published by the Bureau of Mines, makes no mention of mobile cranes in its definition of hoists.

At the hearing the parties negotiated and stated on the record that they had reached a settlement, subject to the approval of the Judge, under which the Petitioner moved that the proposed penalty be reduced from \$240 to \$140, and Respondent moved to withdraw its notice of contest.

The proposed amendment to the penalty was based on information obtained by the Petitioner in its pretrial preparation of this matter. Primarily, Petitioner had found that Respondent had a written company policy setting out a number of safeguards pertaining to the use of a man-basket with a crane and that those safeguards, when used, were such that they showed that the gravity of the violation was not as severe as originally assessed by the Petitioner and further showed that the negligence of the Respondent was not as great as originally assessed by Petitioner.

Conclusion

After careful review and consideration of the pleadings, arguments, and the information placed upon the record at the hearing, I am satisfied that the proposed settlement disposition is reasonable, appropriate and in the public interest.

Accordingly, the motions made at trial are granted.

ORDER

Citation No. 2830003 is affirmed and respondent is ORDERED to pay a civil penalty of \$140 within 30 days from the date of this decision.

- *August F. Cetti*
August F. Cetti
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

John L.C. Black, Esq., TIC-The Industrial Company of Steamboat Springs, Inc., 40185 Routt County Road 129, Steamboat Springs, Colorado 80477 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 2 1987

OTIS ELEVATOR COMPANY, Petitioner	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 87-25-R Citation No. 2690792; 10/27/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 87-26-R Citation No. 2690793; 10/27/86
SECRETARY OF LABOR, MINE SAFETY AND HELATH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. PENN 87-69 A.C. No. 36-00840-03501 B70
OTIS ELEVATOR COMPANY, Respondent	:	Docket No. PENN 87-86 A.C. No. 36-00840-03502 B70
	:	Cambria Slope Mine 33

DECISION

Appearances: Linda M. Henry, Esq., Philadelphia, PA, for Secretary of Labor; W. Scott Railton, Esq., Reed, Smith, Shaw & McClay, Washington, DC, for Otis Elevator Company.

Before: Judge Fauver

These consolidated actions were brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Otis Elevator Company seeks to vacate two citations and the Secretary seeks civil penalties against Otis for the alleged violations. The key issue is whether Otis is subject to the provisions of the Act.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the following:

FINDINGS OF FACT

1. Otis is an independent contractor that regularly inspects, services and repairs a deep shaft elevator at Cambria Slope Mine No. 33, which is operated by Beth Energy

Mines, a subsidiary of Bethlehem Steel Corporation. Otis' contract with Bethlehem Steel Corporation calls for weekly inspection and maintenance of the elevator and repairs on an as-needed basis. The mine produces coal for use in or substantially affecting interstate commerce.

2. Otis employs elevator mechanics in two capacities. Some mechanics are maintenance examiners, who perform weekly inspections and preventive maintenance work on elevators. The other mechanics respond to service calls outside the scope of the routine inspections. Maintenance examiners, service mechanics, and helpers operating out of the Johnstown, Pennsylvania office of Otis service the elevator at the Cambria Slope Mine No. 33. The mine elevator is on a route that includes elevators in a Sears and Roebuck store, an office building, two banks and a hospital. The maintenance examiners, service mechanics, and helpers perform the majority of their work on elevators in above-ground facilities.

3. Otis has an identification number assigned by MSHA for independent contractors who are subject to the Act.

4. Otis' maintenance examiners spend between one and two hours a week inspecting and doing maintenance work on the mine elevator. If problems are discovered, the examiners may remain longer at the mine. Service mechanics and helpers average two to four "call back" trips to the mine each month. These range from one and a half to nine hours per visit depending on the repairs needed. On the average, Otis employees inspect or repair the mine elevator two times a week and spend up to 20 hours a month at the mine. In addition, Otis employees conduct a "no load" safety test of the elevator every 60 days.

5. The elevator transports miners 800 feet underground, stopping at two coal seams. The elevator is the primary escapeway for 60 miners on each shift, and an alternative escapeway for 60 other miners. It was selected as the primary escapeway because it is the easiest and fastest way to exit the mine. Its other primary function is to transport all the production crews. Over 200 miners use the elevator each day to travel to and from their work underground. If the elevator were not available to transport the miners for their shift work, production of coal would be directly affected. The mine superintendent, Peter Merritts, estimated that production would decrease as much as 3,000 clean tons a day if the elevator were not available to transport the miners during a shift change. Also, the elevator is used to transport small tools used by the miners.

6. Otis has control over, and responsibility for, the inspection, maintenance, and repair of the mine elevator. It has the responsibility for ensuring safe and reliable

elevator transportation for all production miners as well as as personnel using the elevator as an escapeway.

7. On October 27, 1986, MSHA Inspector Niehenke issued Citation 2690793 because Otis employees failed to tag an elevator electrical circuit while they were doing electrical work on the elevator. They had locked out the circuit, but they did not place a tag on the circuit. He issued Citation 2690792 because the Otis employees were doing electrical work on the elevator but they were not qualified as coal mine electricians or being supervised by a qualified coal mine electrician.

DISCUSSION WITH FURTHER FINDINGS

In the 1977 Amendments to the Mine Safety Act, Congress amended the definition of a mine operator to include "any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d).

The Act defines "coal or other mine" as "... an area of land from which minerals are extracted ... and ... shafts, slopes, tunnels and workings, structures, facilities ... on the surface or underground, used in ... the work of extracting such minerals" 30 U.S.C. § 802(h). The Senate Committee reporting on the 1977 Amendments stated that, "it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, 95th Cong.,, reprinted in U.S. Code & Cong. Adm. News (1977) 3401, 3414.

The Secretary's administrative "final rule" on independent contractors, found at Part 45, 30 C.F.R., defines independent contractor as a person or business that "contracts to perform services or construction at a mine." The preamble to the final rule reinforces the definition of independent contractor as one who performs service and repair work. The general discussion in the preamble states that the 1977 Act clarified that "independent contractors performing services or construction at mines are subject to the Act." 45 Fed. Reg. at 44494 (July 1, 1980). The commentary also states that independent contractors may perform "short-term" and "intermittent" work at the mines, and that they may be engaged in every type of work from a new mine construction to minor repairs. The Secretary particularly rejected litmus tests for identifying contractors and stated that "enforcement decisions should be made on the basis of the facts pertaining to each particular case." 45 Fed. Reg.

Exposure of employees of an independent contractor to the same hazards as employees of the mine operator is an important consideration in determining application of the

Act. Bituminous Coal Oper. Ass'n v. Secretary of the Interior, 547 F.2d, 240 (4th Cir. 1977). Another important consideration is the point that employees of independent contractors unschooled in mine health and safety may pose a threat to the safety of all persons working at the mine. National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 703 (3rd Cir. 1979).

The Fourth Circuit has held that employees of an electric utility company who read a meter monthly near a mine access road were not subject to the Act. Old Dominion Power Co. v. Donovan, 722 F.2d 92 (4th Cir. 1985).^{1/} The meter was isolated by a chain link fence. The Fourth Circuit found that the meter employees "rarely go upon mine property, and hardly, if ever, come into contact with the hazards of mining." 772 F.2d at 93.

In contrast to that case, Otis employees perform frequent and substantial safety inspections and repairs of the mine elevator. Its employees have a continuing, regular presence at the Cambria Slope Mine No. 33. They visit the mine every week to inspect and service the elevator and in an average month they also perform repairs at the mine four to six times. In January, 1986, for example the repair reports show six visits to the mine in addition to the four weekly maintenance visits, for a total of ten days at the mine.

The mine elevator is a critical part of the mine. It is used as a "mantrip" for all of the production crews. If the elevator breaks down, production could be cut by as much as one third. The elevator is also an escapeway for part of the mine, and as such is subject to MSHA regulations. Thus, Otis employees have a substantial, recurring presence at the mine and they perform crucial safety repairs on a key facility of the mine. They are not "rare" visitors, "remote" from the dangers of the mine as were the employees in Old Dominion. Otis more than meets the Act's broad definition of independent contractor. If a point exists where a contractor's contacts with a mine are too minimal to bring it under the scope of the Act, that point is not met here.

^{1/} The Fourth Circuit relied on the criteria in MSHA's "proposed rule," which initially identified an independent contractor as one involved in "major work" and having a "continuing presence" at the mine. 772 F.2d at 97, fn. 6. However, in promulgating the final rule MSHA specifically retreated from these two criteria. The Secretary is not bound by proposals published in the Federal Register that fail to survive in the final rule.

Inspector Niehenke properly cited Otis for the violations in this case. Otis employees created both violative conditions. They did not tag the circuit they locked out and they performed electrical work on the elevator without the supervision of a qualified mine electrician. As its employees created the conditions, Otis was in the best position to remedy the violations.

With regard to Citation 2690792, Otis violated the plain language of the regulation. Otis employees were performing electrical repair work and they were neither qualified by the Secretary as coal mine electricians nor being supervised by a qualified mine electrician. Performing elecrical work on the mine elevator without certified training and knowledge of mine safety and health rules and requirements presented a discrete safety hazard. This violation could reasonably be expected to result in an accident if persisted in over an indefinite period. The injuries likely in the event of an accident could reasonably be expected to be serious. The inspector's finding of a "significant and substantial" violation in Citation 2690792 will therefore be affirmed.

Otis also violated the safety standard cited in Citation 2690793. Otis had not tagged out the circuit its employees were working on. Thus there was a violation of 30 C.F.R. § 77.501. Inasmuch as the Otis employees had locked out the circuit, the violation did not present a discrete hazard to the Otis employees or the operator's miners. The inspector therefore did not rate this violation "significant and substantial."

Well before the inspection in these cases, Otis was expressly informed by MSHA of its enforcement position that the Act applied to Otis' contract work at the subject mine. Otis disregarded this position and chose to work without complying with the Act and mine safety standards. The inspector's allegation of an "unwarrantable" failure to comply with the standards cited in Citations 2690792 and 2690793 will therefore be affirmed.

Otis' defense that its compliance with the Act and mine safety standards would create a "greater hazard" or a "diminution of safety" is raised in the wrong forum. The Commission has held that the "greater hazard" or "diminution of safety" defense is not permissible where the operator has not first filed a petition for modification with the Secretary of Labor. In Penn Allegheny Coal Co., 3 FMSHRC 1392 (1981), the operator contended that application of the Secretary's regulation would endanger the safety of the miners. The Commission noted that § 101(c) of the Act was specifically designed to resolve such questions, and held that the operator could not wait until it was cited for a

violation of a safety regulation to raise such an issue in an enforcement proceeding:

We cannot endorse this short circuiting of the Act's modification procedures. We believe it is important that questions of diminution of safety first be pursued and resolved in the context of the special procedure provided for in the Act, i.e., a modification proceeding.

The Commission has recognized one narrow exception to this requirement. In Sewell Coal Co., 5 FMSHRC 2029 (1983), the Commission stated:

We realize that emergency situations may arise where the gravity of circumstances and presence of danger may require an immediate response by the operator or its employees, necessitating a departure from the terms of a mandatory standard without first resorting to the Act's modification procedures. In such conditions, an exception to the Act's modification and liability provisions may be necessary in order to further the Act's primary goal, the protection of miners. Penn Allegh did not present such a situation, nor does this case. Rather, these cases involve only the operator's ability to conduct safely routine mining operations on a continuing and regular basis. Therefore, we reserve for a case appropriately raising such an issue detailed consideration of any emergency exception to the general rules on modification and liability.

Otis has done that which the Commission expressly forbids: it has unilaterally determined that it may conduct its operations at a mine site in a "safer" manner than would be achieved by compliance with mandatory safety standards. Absent the narrow circumstances of an emergency situation, Otis may not raise this defense in an enforcement proceeding. It may not sit back and wait until it is cited for a safety violation to allege that greater hazards would exist if it complied with the standards cited. Otis has not shown that an emergency threatening the safety or health of personnel justified its non-compliance with the cited safety standards.

Considering all the criteria for a civil penalty in § 110(i) of the Act, a civil penalty of \$300 for Citation 2690792 and \$20 for Citation 2690793 are found appropriate.

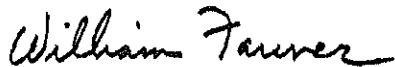
CONCLUSION OF LAW

1. The Commission has jurisdiction in these proceedings.
2. Otis Elevator Company violated the safety standard as charged in Citation 2690792.
3. Otis Elevator Company violated the safety standard as charged in Citation 2690793.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 2690792 is AFFIRMED.
2. Citation 2690793 is AFFIRMED.
3. Otis Elevator Company shall pay the above civil penalties of \$320 within 30 days of this Decision.



William Fauver
Administrative Law Judge

Distribution:

W. Scott Railton, Esq., Reed, Smith, Shaw & McClay, 1150 Connecticut Avenue, Suite 900, Washington, D.C. 20036 (Certified Mail)

Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 3 1987

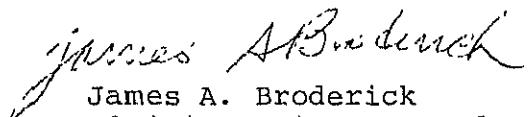
UNITED MINE WORKERS OF	:	DISCRIMINATION PROCEEDING
AMERICA (UMWA),	:	
ON BEHALF OF	:	Docket No. KENT 84-224-D
ROBERT L. COX,	:	
Complainant	:	Ken Underground Mine
	:	
V.	:	
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On November 6, 1987, I issued an order to show cause on or before November 24, 1987, why this proceeding should not be dismissed. No response to the order has been filed.

Therefore, this proceeding is DISMISSED.



James A. Broderick
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Michael A. Kafoury, Esq., Peabody Coal Co., P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 3 1987

UNITED MINE WORKERS OF	:	DISCRIMINATION PROCEEDING
AMERICA (UMWA),	:	
ON BEHALF OF	:	Docket No. KENT 86-65-D
JIMMY JOHNSON,	:	
Complainant	:	
	:	
v.	:	
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

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Therefore, this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Michael A. Kafoury, Esq., Peabody Coal Co., P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 3 1987

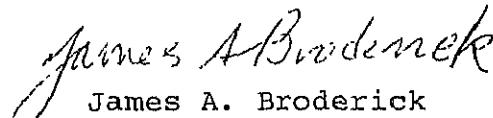
UNITED MINE WORKERS OF	:	DISCRIMINATION PROCEEDING
AMERICA (UMWA),	:	
ON BEHALF OF	:	Docket No. KENT 86-66-D
RICHARD E. JARVIS,	:	
Complainant	:	
	:	
V.	:	
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On November 6, 1987, I issued an order to show cause on or before November 24, 1987, why this proceeding should not be dismissed. No response to the order has been filed.

Therefore, this proceeding is DISMISSED.



James A. Broderick
Administrative Law Judge

Distribution:

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Michael A. Kafoury, Esq., Peabody Coal Co., P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 4 1987

RONALD SIZEMORE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 87-223-D
	:	BARB CD 85-64
WHITAKER COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Mr. Ronald Sizemore, Hazard, Kentucky, pro se;
A. P. Gullet, Esq., Gullett, Combs & Holliday,
Hazard, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Ronald Sizemore under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that the Whitaker Coal Corporation discharged him on August 21, 1985, in violation of section 105(c)(1) of the Act. The preliminary issue before me is whether Mr. Sizemore filed his Complaint with this Commission in a timely manner.

Mr. Sizemore initially filed his Complaint with the Secretary of Labor, on August 26, 1985. Thereafter by letter dated November 21, 1985, the Secretary of Labor, through his agent, Willard Querry, District Manager, informed Mr. Sizemore of his determination that a violation of section 105(c) had not occurred. This letter was received by Mr. Sizemore on November 23, 1985. Sizemore did not however file his complaint of discrimination with this Commission until August 13, 1987, more than 19 months later.

Section 105(c)(3) of the Act provides, in part, that "if the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission charging discrimination or interference in violation of paragraph (1)."

Clearly Mr. Sizemore did not file within the prescribed 30 day time period. The relevant legislative history provides however that "this 30-day limitation may be waived by the court

in appropriate circumstances for excusable failure to meet the requirements". Senate report 95-181, 95th Congress, 1st Session 37 (1977), reprinted for the Senate Subcommittee on Labor, Committee on Human Resources, 95th Congress, 2nd Session, Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978). See also Herman v. Imco Services, 4 FMSHRC 2135 (1982), and Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (1984).

Mr. Sizemore testified in reference to filing his complaint that he thought he "could wait a while and pick it up later". He claims that this was the first opportunity he had to file for nearly 19 months. He maintained that "he had so much to deal with" including the hospitalization of his wife and child, divorce proceedings and a house fire, that he presumably did not have time to file. He concedes however that everyone was out of the hospital, his divorce proceedings were concluded, and that he had received an insurance settlement on his house fire by July 1986, yet did not file for more than a year after that.

Sizemore also acknowledges that he talked to several attorneys about this case. In January 1986 one attorney declined to handle the case advising him that he had not filed timely. Thus as early as January 1986 Sizemore had legal advice that he had not filed within the statutory time limits. He nevertheless further delayed filing a complaint with this Commission until August 13, 1987, over a year-and-a-half later.

Under all the circumstances I have little difficulty in finding that Mr. Sizemore has no legally sufficient excuse or justification for the untimely filing of his complaint with this Commission. Accordingly the Complaint must be dismissed.

ORDER

Discrimination Proceedings Docket No. KENT 87-223-D are dismissed.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mr. Ronald Sizemore, RR#3, Box 225, Hazard, KY 41701
(Certified Mail)

A. P. Gullett, Combs & Holliday, 109 Broadway, P. O. Drawer 1039,
Hazard, KY 41701-05039 (Certified Mail)

npt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 7 1987

GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 85-188-R Order No. 2256015; 3/29/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 85-189-R Order No. 2256016; 3/29/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. PENN 85-190-R Order No. 2256017; 3/29/85
v.	:	Docket No. PENN 85-191-R Order No. 2256018; 3/29/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. PENN 85-192-R Order No. 2256019; 3/29/85
GREENWICH COLLIERIES, Respondent	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. PENN 86-33 A. C. No. 36-02405-03614
GREENWICH COLLIERIES, Respondent	:	Greenwich No. 1 Mine

PARTIAL SUMMARY DECISION

Before: Judge Maurer

These cases are before me on remand from the Commission 1/ with specific instructions from the majority to consider and rule on Greenwich's challenge to the validity of the five section 104(d)(1) orders at bar because they were not issued within 90 days of the underlying section 104(d)(1) citation upon which they were based and because they were not issued "forthwith."

Subsequent to the Commission's decision in these cases, counsel for Greenwich Collieries, Division of Pennsylvania Mines Corporation (PMC) has moved for summary decision pursuant to Commission Rule 64, 29 C.F.R. § 2700.64, arguing that

1/ Greenwich Collieries, 9 FMSHRC 1601 (September 30, 1987).

the instant orders are invalid on the basis of the aforementioned two grounds. PMC had previously included these two bases for invalidity of the orders in their original motion for summary decision filed in April 1986, but I did not consider them at that time. Rather, I partially granted their first motion for summary decision, modifying the five orders to section 104(a) citations, because they were issued based upon an investigation as opposed to an inspection and because the violations had long since ceased to exist at the time the orders were issued. On September 30, 1987, the Commission reversed me on that decision and remanded the cases to me for further proceedings.

The essential facts of these cases are as set out by the Commission in its decision of September 30, 1987: 2/

On February 16, 1984, a methane ignition and explosion occurred at the Greenwich No. 1 mine, an underground coal mine operated by Greenwich Coalries, Division of Pennsylvania Mines Corporation ("Greenwich"), and located in southwestern Pennsylvania. Three miners were killed and eleven others were injured in the explosion. Representatives of the Department of Labor's Mine Safety and Health Administration ("MSHA") arrived at the mine, engaged in rescue and recovery efforts, observed conditions at the site, and began an investigation of the cause of the explosion. As part of its investigation, MSHA examined the entire mine between February 25 and April 5, 1984, and between March 27 and April 27, 1984, took sworn statements from numerous individuals who participated in the recovery operations or who had information regarding the conditions in the mine prior to the explosion. The Secretary's investigators concluded that the operator's unwarrantable failure to comply with five mandatory safety standards contributed to the accident. Therefore, on March 29, 1985, MSHA Inspector Theodore W. Glusko issued to Greenwich the five section 104(d)(1) orders of withdrawal at issue in this case. The orders alleged that violations of various safety standards had occurred in December 1983 and January and February 1984. Each of the section 104(d)(1) orders indicated that they were based on a section 104(d)(1) citation issued to Greenwich on February 24, 1984. The orders indicated that they were terminated at the time they were issued. No miners were withdrawn from mine as a result of the orders.

1602-1603.

The Secretary, in his brief in opposition to the motion for summary decision goes into much more detail concerning the merits of the alleged violations and the special findings. However, the merits of these cases are not at issue at this point in the proceedings. PMC's motion for summary decision is based entirely on the invalidity of the Orders under the terms of § 104(d)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 3/

3/ Section 104(d)(1) provides:

If, upon an inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

It is uncontroverted that the 104(d)(1) orders at issue here were not actually issued within 90 days of the underlying 104(d)(1) citation. Each was issued on March 29, 1985, approximately thirteen months after the February 24, 1984, § 104(d)(1) citation on which they were based. However, that fact is not particularly relevant to my reading of the statute's requirements. Section 104(d)(1) requires that if the Secretary, during the same inspection or any subsequent inspection within 90 days after the issuance of the underlying (d)(1) citation, finds another violation caused by an unwarrantable failure, he shall forthwith issue an order. The 90-day period starts running with the issuance of the (d)(1) citation. In this case February 24, 1984. Any subsequent violation the Secretary turns up within the following 90-day period which he also finds to be caused by an unwarrantable failure shall be the subject of a (d)(1) order, issued forthwith. In this case, the Secretary alleges that physical evidence of each of the violations was observed during the course of the inspection of the mine immediately after the explosion and additional evidence relating to the nature and circumstances surrounding the violations was obtained during March and April of 1984 during the course of formal testimony taken from those having knowledge pertaining to the accident, and conditions in the mine prior to the explosion. An inference can be drawn that at least by April 27, 1984, when the formal testimony was concluded, the existence of the violations and the factual basis for an unwarrantability finding were known to the Secretary. The Secretary goes even further and avers that within a few days or even hours after the explosion most of the investigators had a "strong reason" to believe that these violations existed at the time of the explosion and that questions of management failures (i.e., unwarrantable failure special findings) were involved. The critical finding of fact which needs to be made on this point then is whether or not the Secretary had found the five alleged unwarrantable failure violations within the requisite 90-day period.

For purposes of ruling on this motion for summary decision, I accept as true the Secretary's allegation that the violations alleged in these cases were found by the Secretary during the same inspection within 90 days of the February 24, 1984, (d)(1) citation on which they are based; that is, they were ultimately issued for violations which were found within 90 days of the underlying unwarrantable violation, as required by § 104(d)(1). Therefore, I find PMC's challenge to the validity of these five orders for the reason that they were not issued within 90 days of the original (d)(1) citation to be without merit.

Turning now to the second ground for invalidity as alleged by PMC to be that the subject orders were not issued "forthwith" as required by § 104(d)(1).

Section 104(d)(1) states that once a 104(d)(1) citation has been issued, if within 90 days the Secretary finds another violation of a mandatory health or safety standard caused by an unwarrantable failure to comply, "he shall forthwith issue an order" (Emphasis added).

PMC maintains that the inclusion of the word "forthwith," which according to its dictionary definition or common usage means "immediately" creates a jurisdictional timeliness requirement for the issuance of orders under § 104(d)(1).

The orders at bar allege that violations of various safety standards occurred in December of 1983 and January and February of 1984. The explosion occurred on February 16, 1984. MSHA examined the entire mine between February 25 and April 5, 1984, and took sworn testimony between March 27 and April 27, 1984, concerning the accident and conditions extant in the mine prior to the explosion. As I have previously noted, all of the data necessary to issue the orders had been found on or before April 27, 1984. Therefore, MSHA could have issued the instant orders on or about April 27, 1984, should they have chosen to. They chose not to, however, finally issuing the orders on March 29, 1985, at least eleven months after it was feasible for them to have done so.

Given that an eleven month delay hardly demonstrates immediacy, the question remains is the "forthwith" requirement for issuance jurisdictional. The Secretary argues that it is not and that in any event the delay experienced herein in issuing these orders was "reasonable and fully justified." That delay according to the Secretary being because the five orders at bar involve violations that the Secretary determined directly contributed to the deaths of three miners in a major mine explosion; and it is traditional in these circumstances that citations and orders which are deemed to be related to the major causes of major accidents are not issued until such time as the investigation team has formulated a major draft of the final investigative report. It is noteworthy that the initial unwarrantable violation and over 100 section 104(d)(1) orders were issued in the aftermath of the explosion during the accident investigation. None of these violations were found to be, however, directly related to the explosion. On the other hand, the five orders at bar were purposefully not issued at that time because they did involve violations that had been identified as having contributed to the accident itself. These violations were purportedly subjected to greater scrutiny and research and ultimately issued as (d)(1) orders on March 29, 1985.

The Secretary's secondary or "fall-back" position on this point seems to be that even if the "forthwith" requirement is

jurisdictional, deviations therefrom are not jurisdictionally defective unless the operator can demonstrate substantial prejudice or a lack of substantive due process. The Secretary then concludes that in this particular case no harm has accrued to the operator by virtue of the delayed issuance and absent a finding that such harm exists, the statutory requirement that such orders issue "forthwith" cannot be an absolute procedural bar to the delayed issuance of the (d)(1) orders, as here.

Section 104(d) differs from § 104(a) in that the statute expressly recites that delay in issuing a citation under 104(a) is not jurisdictional. There is no similar saving provision in 104(d), and I conclude that the Secretary's failure to issue the orders at bar "forthwith" is a jurisdictional defect which renders them invalid as (d)(1) orders. There clearly is Congressional interest in the timeliness of withdrawal orders, and I can find no indication in the Act or its legislative history that these timeliness requirements deliberately placed in the Act by Congress are not jurisdictional prerequisites to the issuance of valid withdrawal orders pursuant to § 104(d). Furthermore, there is no evidence of Congressional intent to differentiate between the timeliness of withdrawal orders that relate to violations which cause mine accidents and those which do not. The Secretary's enforcement policy which caused the long delay in issuing the (d)(1) orders at bar, no matter how "reasonable" it may be, is clearly at odds with the express timeliness term of the statute itself.

With regard to the Secretary's argument that PMC has not been prejudiced by the delay in issuance of the orders, I find that in the case of § 104(d)(1) orders, as opposed to § 104(a) citations, a showing of prejudice is not required. However, even if some showing was required, I agree with PMC that an 11-13 month delay in notifying the operator of what specifically it is charged with doing or failing to do is inherently prejudicial in some degree to an operator's ability to defend itself against the allegations contained in the orders.

PMC also contends that MSHA's delays in issuing these orders violates even § 104(a)'s more liberal standard of "reasonable promptness." Perhaps, but since the statutory mandate that § 104(a) citations be issued with "reasonable promptness" is not a jurisdictional prerequisite to enforcement, I am unwilling to dispose of these extremely serious allegations on that kind of procedural basis. Therefore, I am modifying the five (d)(1) orders at bar to § 104(a) citations and a hearing on the merits of the violations, as well as the S&S special findings and penalties to be imposed, if any, will be necessary to finally dispose of these proceedings.

ORDER

In accordance with the foregoing, the motion of PMC for summary decision is granted in part and denied in part; and Order Nos. 2256015-2256019 are hereby modified to citations under section 104(a) of the Act.



Roy J. Maurer
Administrative Law Judge

Distribution:

Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Ave., NW, Washington, DC 20004 (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Earl R. Pfeffer, Esq., United Mine Workers of America, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COIFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 7 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner : CIVIL PENALTY PROCEEDING
v. :
Docket No. WEST 87-74
A.C. No. 05-00469-03598
Dutch Creek No. 2 Mine
:
MID-CONTINENT RESOURCES, INC.,:
Respondent :

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Edward Mulhall, Jr., Esq., Delaney & Balcomb,
Glenwood Springs, Colorado,
for Respondent.

Before: Judge Morris

The Secretary of labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violating 30 C.F.R. § 90.100, a regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et al., (the Act).

After notice to the parties a hearing on the merits commenced in Glenwood Springs, Colorado, on April 14, 1987. The parties did not file post-trial briefs but they orally argued their views.

Issues

The issues are whether respondent violated the regulation; if so, what penalty is appropriate.

Summary of the Case

Citation 9996024 alleges respondent violated 30 C.F.R. § 90.100 which provides as follows:

§ 90.100 Respirable dust standard

After the twentieth calendar day following receipt of notification from MSHA that a Part 90 miner is employed at the mine, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner

in the active workings of the mine is exposed at or below 1.0 milligrams per cubic meter of air. Concentrations shall be measured with an approved sampling device and expressed in terms of an equivalent concentration determined in accordance with § 90.206 [Approved sampling devices; equivalent concentrations].

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The case involves miner Verlin F. Windedahl (Tr. 4).
2. After Windedahl received a work permit a chest x-ray disclosed that he was in the early stages of Black Lung (pneumoconiosis) (Tr. 4).
3. Under Part 90 regulations such a miner, at his request, may transfer to an atmosphere where there is less than one milligram of respirable dust per cubic meter of air (Tr. 5).
4. The operator was notified of Windedahl's Part 90 classification on March 24, 1986 (Tr. 5).
5. On April 16, 1986 Windedahl was transferred to what was believed to be a less dusty atmosphere.
6. After he was reassigned the operator took samples within the breathing zone of the miner. The samples were sent to MSHA for analysis. The results are set forth in Citation No. 9996024 infra. The results, received by the operator on May 12, 1986, are true and accurate as ascertained by the laboratory (Tr. 5, 6, Ex. Pl(a)).
7. Other samples were taken from May 16, 1986 through June 30, 1986.
8. On June 30, 1986 a second group of samples indicated there was still an exposure to respirable dust that exceeded one milligram per cubic meter (Tr. 6).
9. The samples taken June 30, 1986 resulted in a § 104(b) Order No. 2213912 issued by MSHA Inspector Michael Horbatko (Tr. 6).
10. The sampling results from the laboratory of miner Windedahl are true and correct (Tr. 6, 7).

The file reflects that the operator contested Citation No. 9996024 and the subsequent § 104(b) Order No. 2213912.

Citation No. 9996024, issued May 7, 1986, provides in its relevant part as follows:

Based on the results of 5 dust samples collected by the operator and reported on the attached teletype message, dated May 6, 1986, the average concentration of respirable dust in designated area sampling point 850-0 was 2.7 milligrams exceeding the applicable limit of 1.0 milligrams. Management is hereby required to take corrective action to lower the concentration of respirable dust to within the permissible concentrations of 1.0 milligrams per cubic meter of air and then sample each shift until five valid samples are taken and transmitted in accordance with Section 90.209. Approved respiratory equipment shall be made available to all persons working in the area. Based on the results of the company's sampling program, this Notice was issued in accordance with Section 104(A) of the Federal Mine Safety and Health Act of 1977. (Exhibit P-1(a))

Subsequently, three valid respirable dust samples were received for the Part 90 Miner within the required time. A citation, dated June 9, 1986 was issued for not submitting five valid samples within the required time. Time was granted to collect additional samples.

On July 1, 1986, Order No. 2213912 was issued under Section 104(b) of the Act. In its pertinent portion it provided as follows:

The respirable dust concentration of the Part 90 Miner identified in Citation No. 9996024, dated 05/07/86, is still in excess of the applicable standard. Due to the obvious lack of effort by the operator to control respirable dust, the period of reasonable time for the abatement of this violation is not further extended.

(Exhibit P-2(a))

Subsequently the order was modified and later terminated.

At the hearing the Secretary rested on the stipulation of the parties and the testimony of MSHA safety and health specialist Grant McDonald.

GRANT McDONALD is responsible for enforcing the respirable dust standards (Tr. 16, 17).

Respirable dust is measured in microns. A micron, which is invisible to the naked eye, measures 1/25,000th of an inch. Studies indicate that pneumoconiosis is caused by dust measuring five microns or less. This size causes massive fibrosis in the lungs. Eventually it can cause death. A dust pump will pickup particles of respirable size. It will also pickup particles from five to ten microns in size (Tr. 19).

An option under Part 90 permits the miner to transfer to a less dusty atmosphere. If he does transfer his new work position is designated. He is then subject to the special

sampling provided in Part 90 (Tr. 22, 23). MSHA was advised that miner Windedahl exercised his option and transferred to a less dusty atmosphere (Tr. 23). At that point MSHA checked to see if they have transferred the miner to a less dusty area. The new work area must contain less than one milligram of respirable dust (Tr. 24).

Windedahl was reassigned as a "Stopping Man" (Tr. 25). This position is in the intake air, which is usually clean air, i.e., one milligram or below (Tr. 26).

After transfer an operator has 15 calendar days to sample the transferee (Tr. 27).

Most operators and MSHA use a MSA respirable dust pump (Tr. 28). Each filter is weighed and sent to MSHA's Technical Support Office in Pittsburgh office for analysis (Tr. 29).

In most cases the miner either wears the pump within four feet of his working place. It basically samples the air of the breathing zone of the worker (Tr. 30).

Particles larger than 5 microns void any sample. The larger size cannot cause lung disease (Tr. 34).

If the sample shows an overexposure the sampling is continued (Tr. 35). When information comes to the Price, Utah office showing an overexposure a citation is issued.

A Part 90 Miner needs only be sampled bi-monthly if he hasn't been previously exposed. If the sampling shows the allowable limit has been exceeded then five additional samples are required. The actual sampling is done by duly certified mine personnel (Tr. 36-43).

Exhibit P(1)(a), a citation for five samples, shows an average concentration of 2.7 milligrams (Tr. 46, 47, 56).

After Windedahl exercised his option to transfer he became a stopping man. As such he works along the main haulage, the least dusty place in a coal mine (Tr. 57, 59). More dust is usually generated in the face area (Tr. 86).

Inspector McDonald issued Citation 9996024 but MSHA Inspector Horbatko issued the 104(b) Order (Tr. 62, 63). Some operators take six samples but Mid-Continent does not (Tr. 77).

Michael S. Horbatko, Donald E. Ford and David A. Powell testified for the operator.

MICHAEL S. HORBATKO, an MSHA mine safety and health specialist, issued the 104(b) order. He did not investigate at Mid-Continent but relied on the information of the dust samples relayed to him by Inspector McDonald (Tr. 87-91, Exhibit P1(b), P2(b)).

DONALD E. FORD, safety inspector, also serves as noise and dust technician for Mid-Continent Resources. He was originally certified by MSHA as a dust technician in 1977.

The company uses a standard dust sampling device (Tr. 102, 103, Ex. R9, R10, R11).

Detailed information relating to the subject miner is submitted with the sampling cassette (Tr. 108-111, Ex. R12).

Verlin Windedahl started with Mid-Continent in November 1986. Notice that he was a Part 90 miner was received in March 1986 (Tr. 112, 113). Windedahl had worked as a hardrock miner but now as an underground miner (Tr. 113).

The witness prepared and color-coded Exhibit R13 (Tr. 113, 114, Ex. R13). After Windedahl was transferred none of his samples were in compliance. They all exceeded one milligram (Tr. 122). A stopping man could be anywhere in the mine (Tr. 123).

The operator offered various company records pertaining to dust sampling (Ex. R14, R15, R16).

The witness observed Windedahl 300 feet or more back from the face. At that position he would not have been exposed to the same dust environment as the people in the mechanized mining unit section where they were developing the slopes (Tr. 138, 139, Ex. R16).

The company received a notice for non-compliance on May 23 (dated May 19th) for an average concentration of 4.7 milligrams. This was caused by one sample cycle of 20.2 milligrams (Tr. 142). The witness later learned that a bunch of workers were "horsing around" and throwing rock dust at the sampler that day (Tr. 141-145, Ex. R16). However, Windedahl worked in the slope section when he was first recognized as a Part 90 miner. Windedahl was first reassigned as a stopping repairman in April 1986 (Tr. 148, Ex. R16).

The sampling results and the computer results (from Pittsburgh) concerning Windedahl cannot be reconciled. Windedahl was out-by the face and in the fresh in-take air. Except for one bad sample at the face the average would have averaged about one milligram (Tr. 150, 151). In the opinion of the witness, the worker out-by the face was inadvertently or advertently exposing himself to more dust. This could be an accident or on purpose (Tr. 152). Based on the witness' experience the face area where the coal is being produced is the more dusty area (Tr. 153). Higher dust readings out-by the face than in-by the producing section indicates that something not truly accurate was transpiring (Tr. 153).

The computer printouts of the samplings are mailed from Pittsburgh to the company's Carbondale office. The coal basin is 35 miles to the south so any correspondence would not be delivered to the witness until a day or two later (Tr. 154). The computer printout predating Mr. Horbatko's order was received at the Carbondale office on June 30, 1986 (Tr. 155). The witness received it the same day Mr. Horbatko arrived on the property (Tr. 156).

Ford never talked to Windedahl about his excessively high ratings. No comment was made because he wasn't being accusatory (Tr. 161). Further, Ford didn't know if anyone else at Mid-Continent had talked to the miner. Windedahl is no longer employed by Mid-Continent, nor did Ford know his present whereabouts (Tr. 162). The pump that Windedahl returned each day to Ford appeared to be working properly (Tr. 172). Ford did not particularly observe Windedahl during any particular time of each day (Tr. 173).

A timberman sets timber in different sections of the mine. He installs wooden and fiber cribs (Tr. 177).

Windedahl's assignment in the slope section was anywhere from 300 to 1000 feet out-by where the coal was being mined (Tr. 180). He was also working on the intake, or fresh air side, of the stoppings. There is less dust there than in the return air (Tr. 186).

DAVID A. POWELL has been the safety director of Mid-Continent Resources for four years (Tr. 92).

In the spring of 1986 the company was advised that Verlin F. Windedahl qualified as a Part 90 miner (Tr. 93, Ex. R2).

The operator transferred Windedahl and designated an occupation code for him (Tr. 94, 95, Ex. R3, R4). The operator subsequently received a citation for failing to furnish five valid respirable dust samples within 15 days after the transfer (Tr. 96, Ex. R5) The citation was subsequently vacated (Tr. 97, Ex. R6).

The operator received a computer printout on May 12, 1986 (Tr. 98, Ex. R7). On June 30, 1986 the company received a duplicate copy of sample results on Windedahl (Tr. 99, Ex. R8).

Discussion

This case involves Citation No. 9996024 and Order No. 2213912. However, a penalty is proposed only for the citation.

The regulation requires that after being notified that a Part 90 miner has been exposed the operator must maintain the average concentrations of respirable dust at or below 1.0 such miner.

In the instant case the stipulation and the evidence establishes that the operator was notified on March 24, 1986 of Windedahl's status. The twentieth calendar day following notification is April 13, 1986 (a Sunday). On April 16, 1986, Windedahl was reassigned. The first sampling cycle took place April 14-21, 1986. On May 12, 1986 the first sample results resulted in the issuance of Citation No. 9996024 on May 7, 1986. The second sampling cycle took place May 16 - June 17, 1986. The May 22, 1986 sample was voided due to oversized particles. Further, sampling was done and the results were available on June 30, 1986. The samples exceeded 1.0 milligrams and the following day, July 1, 1986, a § 104(b) Order was issued.

The foregoing facts establish that Mid-Continent violated § 90.100 inasmuch as Windedahl was exposed to concentrations above 1.0 milligrams more than 20 days after Mid-Continent was notified of his status as a Part 90 miner.

Mid-Continent does not contend otherwise. It admits that it violated § 90.100 and that a penalty should be assessed for Citation 9996024 (Tr. 9, 10, 203). The operator's principal attack is focused on the § 104(b) Order.

To proceed to Mid-Continent's arguments: As a threshold matter it asserts that § 90.100 conflicts with the Act. Specifically, Mid-Continent claims the Act provides an option that the regulation does not recognize.

30 U.S.C. § 843(b)(2) provides as follows:

(2) Effective three years after December 30, 1969, any miner who, in the judgment of the Secretary of Health and Human Services based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 1.0 milligrams [sic] of dust per cubic meter of air, or if such level is not attainable in such mine, to a position in such mine where the concentration of respirable dust is the lowest attainable below 2.0 milligrams per cubic meter of air.

The option, referred to by Mid-Continent, and not incorporated in the regulation relates to the situation when the concentration of 1.0 milligrams is not attainable in the mine.

The operator's argument is without merit. It is true that the regulation does not address a situation where a level of 1.0 milligrams cannot be attained. However, in the instant situation the order was terminated when the atmosphere attained .06 milligrams. In sum, the operator has not presented a factual situation within the terms of the statute.

In addition, when one compares 30 C.F.R. § 90.100 with the broader respirable dust regulation, 30 C.F.R. § 70.100(a), (infra) it is apparent the Secretary insists on extra precautions when a Part 90 miner is involved.

Mid-Continent further argues that Windedahl's dust samplings do not square with reality. Specifically, it is asserted that Windedahl was out-by the face. In that location an anomaly occurred: he generated a greater concentration of dust than miners at the face.

I am not persuaded by the company's argument on the minimal record presented here. A timberman, who is moving about at his work stations, could generate more dust than miners at the working face. Further, no credible evidence supports the view that Windedahl "salted" his sampling cassette.

Mid-Continent further states that the § 104(b) Order is invalid because Inspector Horbatko did not investigate the situation at the mine.

The evidence is uncontroverted that Inspector Horbatko relied on hearsay from Inspector McDonald as well as the Pittsburgh computer generated information as to the results of the dust sampling. It is apparent that the inspector did not conduct his own investigation.

The basic issues raised by Mid-Continent were considered by the Commission in a series of cases decided September 30, 1987. Nacco Mining Company, 9 FMSHRC 1541, White County Coal Company, 9 FMSHRC 1578, Emerald Mines Corporation, 9 FMSHRC 1590, Greenwich Collieries, 9 FMSHRC 1601. In view of the Commission's rulings, I overrule Mid-Continent's motion to dismiss.

Finally, Mid-Continent states that the first set of dust samples were an obvious aberration. Therefore, the company should have been entitled to a resampling.

I disagree. The regulation is explicit. It does not mandate any second sampling as is urged here.

The Secretary contends the violation is S & S, that is, significant and substantial within the meaning of the Act. I

agree. A violation of a similar dust standard ^{1/} for coal mines has been held to be S & S. Consolidation Coal Co., 5 FMSHRC 378 (1983); 8 FMSHRC 890, 899 (1986). The Commission's view was upheld on appeal in Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, et al, 824 F.2d 1071 (D.C. Cir. 1987).

For the foregoing reasons, Citation 9996024 should be affirmed.

Civil Penalty

In the instant case the Secretary seeks to impose a civil penalty of \$725 for the violation of Citation No. 9996024. The Secretary has not sought a penalty for the violation of the § 104(b) Order. Accordingly, in imposing a penalty I will only address the evidence concerning Citation No. 9996024.

The statutory criteria to access such civil penalties is set forth in Section 110(i) of the Act, now codified at 30 U.S.C. § 820(i).

I find from the evidence that the operator's history of previous violations is numerically high. Specifically, the evidence shows the following citations and orders have been issued to Mid-Continent:

Year	S & S	Non S & S	Total	Orders
1983	34	211	245	15
1984	185	280	465	14
1985	330	181	511	29
1986	473	141	614	59

The company offers evidence to show that its citations are only average in the industry (Exhibits R30, R31, R32, R33, R37, R38). I agree the evidence does show Mid-Continent's proportional increase in S & S violations generally corresponds to the national increase in the years 1983 through 1986. It is, however, still disturbing that the operator's S & S violations continue to increase from year to year. The operator was negligent in view of the time interval that elapsed between when it received the notice concerning Windedahl's status and when it completed sampling dust at the new work location. The record

1/ 30 C.F.R. § 70.100(a) which provides:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations).

does not present any evidence concerning the operator's financial condition. Therefore, in the absence of any facts to the contrary, I conclude that the payment of a civil penalty as provided hereafter is appropriate considering the size of the operator and such penalty will not cause the company to discontinue in business. Buffalo Mining Co., 2 IBMA 226 (1973); Associated Drilling, Inc., 3 IBMA 164 (1974); El Paso Rock Quarries, Inc., 5 FMSHRC 1056 (1983). The gravity of the violation is high since the violation is significant and substantial. I do not credit the operator with statutory good faith since the five samples were not taken within the prescribed period of time.

On balance, and in view of the statutory criteria, I consider a penalty of \$300 to be appropriate.

Conclusions of Law

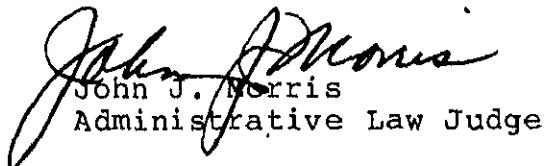
Based on the entire record and the factual findings made in the narrative portion of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated 30 C.F.R. § 90.100.
3. Citation No. 9996024 should be affirmed and a civil penalty assessed therefor.

ORDER

Based on the foregoing findings of fact and conclusions of law I enter the following order:

Citation No. 9996024 is affirmed and a penalty of \$300 is assessed.



John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Edward Mulhall, Jr., Esq., Delaney & Balcomb, P.O. Drawer 790, Glenwood Springs, CO 81602 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

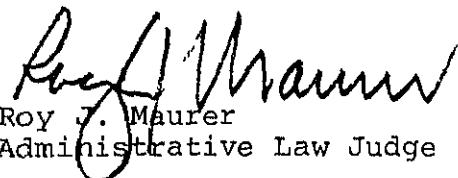
DEC 8 1987

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 87-177-D
ON BEHALF OF	:	
JOHN P. GRINDER,	:	PITT CD 87-06
Complainant	:	
	:	
V.	:	
	:	
KARL'S DRILLING CO., INC.,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Maurer

The Complainant, Secretary of Labor, with the consent of the individual complainant, John P. Grinder, requests approval to withdraw his complaint in the captioned case on the grounds that the parties have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.



Roy J. Maurer
Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Ralph L. S. Montana, Esq., RD #3, Box 122, Clarion, PA 16214 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 9 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 87-50
Petitioner : A.C. No. 36-02405-03658
v. :
ROCHESTER & PITTSBURGH COAL : Greenwich Collieries No. 1
COMPANY, :
Respondent :
:

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Petitioner;
Joseph Yuhas and Joseph T. Kosek, Esqs.,
Greenwich Collieries, Ebensburg, Pennsylvania,
for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of \$650, for an alleged violation of mandatory safety standard 30 C.F.R. § 75.316, as stated in a section 104(d)(2) Order No. 2690667, issued on August 5, 1986. The respondent filed a timely answer and contest and a hearing was held in Indiana, Pennsylvania. The parties filed posthearing briefs, and I have considered the arguments made in the course of my adjudication of this case.

Issues

The issues presented in these proceedings are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so,

the appropriate civil penalty to be assessed for the violation based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S&S) findings concerning the violation are supportable.

3. Additional issues raised by the parties in this proceeding are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 6-7):

1. The respondent is subject to the jurisdiction of the Commission and the presiding Administrative Law Judge.

2. The section 104(a) citation in question, as modified to a section 104(d)(2) order, was duly served on the respondent by an authorized representative of the Secretary of Labor.

3. The size of the respondent company is 8,580,078 tons of coal produced, or man-hours worked, and the size of the subject mine is 565,108 production tons of coal.

4. The respondent's history of prior violations consists of 168 violations for the 8-month period preceding the issuance of the violation in issue.

5. The proposed civil penalty assessment will not affect the respondent's ability to continue in business.

6. The violation was abated by the respondent in good faith within the time fixed by the inspector.

7. At the time of the issuance of the modified order respondent's Greenwich No. 1 Mine was on "a (d) Chain, and there had been no intervening clean inspections to remove them from the (d) chain."

8. The applicable ventilation plan for the Greenwich No. 1 Mine, Review Number 28, was in effect at the time of the issuance of the violation in issue.

Discussion

The inspector initially issued a section 104(a) "S&S Citation No. 2690667, on August 4, 1986, alleging a violation of 30 C.F.R. § 75.316, and the violative condition or practice is stated as follows:

The approved ventilation and methane and dust-control plan was not being complied with in the D-5 active working section in that the section is on full retreat mining and the operator does not have an approved ventilation plan showing the ventilation system for retreat mining in this area.

The inspector modified the citation on August 8, 1986, to a section 104(d)(2) order, to reflect the correct date of issue as August 5, 1986, and the justification for the modification states as follows:

No. 2690667 is being modified based on the fact that when the condition was observed and a discussion held with mine management, James Kukura, General Manager, stated pillarizing had been done in the area for several months with on-going inspections by MSHA and no one questioned the need of a ventilation plan so therefore using this in the thought process for determining negligence it was determined to be moderate. However, after telephone conversations with William Onuscheck, company ventilation engineer, and review of the ventilation plan, it is apparent to this writer that the company did have an approved ventilation plan

for pillar mining prior to the date of issuance for the D-5 area. However, the system of mining changed, thus necessitating a need for a new ventilation plan, and MSHA inspectors had not been in this area prior to this writer's observations of the violation.

Petitioner's Testimony and Evidence

MSHA Inspector and Ventilation Specialist Samuel J. Brunatti, testified as to his experience, training, and duties, which include the review of underground mine ventilation plans to insure that the system of mining coincides with the approved plans. He confirmed that he issued the citation, as modified to an order, during the course of a ventilation technical inspection of the mine, (exhibit G-1). He also confirmed that ventilation plan Review 28 was in effect at the time of his inspection, and he stated that he was "fairly familiar" with that plan at the time of the inspection (Tr. 9-13).

Mr. Brunatti stated that he issued the violation after observing retreat mining in the D-5 working section where pillars had been extracted on the return side while driving the section in, and rooms were being driven to the left side off the intake side and pillars were being extracted "the whole way across, creating a solid gob." Mr. Brunatti observed that one row of pillars had been extracted, and "they were on the second row" (Tr. 21). He issued the violation because the respondent did not have an approved ventilation face print covering the type of mining which was taking place, and he confirmed this when he reviewed the ventilation plans and prints (Tr. 14).

Mr. Brunatti confirmed that the inspection took place on August 5, 1986, and that his reference to August 4th was a mistake (Tr. 13). He identified a copy of his inspection notes of August 5th, which reflect that "Gob air was coming into the section in return entry," and he confirmed that he made this observation on August 5th. He stated that no ventilation plan was available to show this ventilation, and that the approved plans are required to show how the section is to be ventilated, with appropriate ventilation controls to assure a positive pressure on the gob to keep methane gas going away from, rather than back into, the active section. None of the plans which he had reviewed showed how the gob area was to be ventilated in the D-5 section (Tr. 19).

Mr. Brunatti stated that while underground at the time he issued the citation, respondent's safety inspector escort Joseph DeSalvo advised him that a plan was in effect for the mining which was taking place. When they arrived on the surface, mine superintendent Lowmaster and general mine manager James Cocora advised Mr. Brunatti that another MSHA inspector had previously been in the same D-5 section area which was cited and that the same type of mining was taking place. Based on this information, Mr. Brunatti issued a section 104(a) citation with a "moderate" negligence finding because "I felt that if one of our inspectors didn't observe it to be a violation, I didn't feel maybe the company did" (Tr. 20).

Mr. Brunatti stated that after issuing the citation, he spoke with the inspector who had been in the area previously and learned that pillar mining was taking place at that time on the return side only, and that the left or intake side had not as yet been developed or pillared. Mr. Brunatti stated further that he also spoke with respondent's ventilation engineer William Onuscheck by telephone, and Mr. Onuscheck led him to believe that there was some miscommunication between his office and mine management in that the mine ventilation plans that had been submitted did not correspond to the type of mining taking place in the D-5 area on August 5. Mr. Brunatti stated that he was left with the impression that the respondent had submitted a ventilation plan for review without mine management at the mine level being aware of it, and he came to this conclusion because of statements made by Mr. Lowmaster and Mr. Cocora that they had never seen the plan even though it was the one in effect at that time, and they "were stunned" that it was the plan which was in effect. Mr. Onuscheck assured Mr. Brunatti that he would submit a plan to correspond with the mining taking place to MSHA's Pittsburgh Office for approval (Tr. 20-26).

Mr. Brunatti stated that based on the aforesaid conversations with mine management, including Mr. Onuscheck, he concluded that the respondent submitted face prints as part of the mine ventilation plan without management at the mine level being aware of it, and that the plan submitted did not correspond with the type of mining that he observed going on. Mr. Brunatti also stated that when he first showed mine management the plan which was in effect, he felt that they realized that they needed a plan for the mine area other than the one which had been submitted as part of Review No. 28. Mr. Brunatti did not believe that Review No. 28 pertained to the area being mined (Tr. 28). Mr. Brunatti believed that the respondent knew that it was required to submit new face

prints when it changed its system of mining, and as an example of this, he identified a copy of Review 27, which had previously been submitted to show how the return and intake pillars and gob would be ventilated (Tr. 29-30; exhibit G-3).

Mr. Brunatti identified exhibit G-4, as a copy of the ventilation plan addendum made a part of Review 28, as submitted by the respondent to MSHA to abate the violation, and he explained the map shown on page three of the plan (Tr. 31-34). Mr. Brunatti confirmed that a mine operator may at times use the same ventilation face print to cover different mine entries or sections if every section and entry uses identical ventilation systems. However, this was not the case when the violation was issued, and any time changes occur in the ventilation system or direction of airflow, an operator is required to submit an addendum to the ventilation plan to the district manager before making any changes (Tr. 38-39). Mr. Brunatti explained the meaning of "mirror image" ventilation plans, and confirmed that it did not apply in this case because "they took rooms and pillared off the return side and also drove rooms and pillars off the intake side," and the respondent had no approved plan for mining off both sides (Tr. 40).

In response to further questions, Mr. Brunatti confirmed that the essence of the violation lies in the fact that the respondent was in full retreat mining and had no ventilation plan to cover full retreat mining both left and right, left off the intake, right off the return, and pulling everything solid across (Tr. 41-42). He confirmed that the section was not being ventilated properly because the air going out of the gob was coming back on the return side of the section (Tr. 45). He explained the change in the mining system which prompted him to issue the citation for not having submitted a new ventilation plan to cover that change as follows (Tr. 49-50):

THE WITNESS: Originally they had a plan approved, as they were driving the entries they drove rooms to the right off the return side and pillared those; and they did that. When they advanced the section to its limit, then they started driving rooms left off the intake and pulling pillars and connecting that gob on the return side; that's when it necessitated the change. Not a change so much as a new plan.

JUDGE KOUTRAS: And since they had this prior plan, that led you to believe that they had prior knowledge that they were required to submit a new plan when they went to a different system of mining, is that correct?

THE WITNESS: Yes. On previous ventilation reviews, they have submitted those plans.

On cross-examination, Mr. Brunatti confirmed that he believed the violation was "significant and substantial" because the section was not being properly ventilated in that air was coming out of the gob back into the section in the number 3 entry which was a return, and he could feel the air (Tr. 59). He agreed that the gob air is supposed to go into a return, but that "the pressure is to be from the section through the gob to the return, not the pressure from the gob through the gob back into the return" (Tr. 57). He could not recall taking any smoke tests, but he did take methane readings at various locations in the section, but found no excessive levels. The highest methane reading on the section was .2 percent, and he agreed that methane was not a problem on the day of his inspection (Tr. 57-58).

Mr. Brunatti confirmed that the system of mining he observed taking place on August 5, 1986, in the D-5 section was retreat mining in which rooms were originally driven up and pillared on the return side, and he agreed that the respondent had a plan for this. However, after reaching the limits of the mined entries, rooms were driven to the left off the intake side, and pillars were being extracted, thus creating one gob from the intake side to the return side. Mr. Brunatti believed that retreat mining and pillar mining are interchangeable terms. He agreed that the respondent had an approved plan to pillar the right return side, but did not have a plan to drive the rooms off the left intake side to extract the pillars off the solid back to the other gob. In his view, when mining moved from the right side, which had been pillared, to the left side, the system of mining was changed from mining rooms off the return side to the system of mining rooms off the intake side, and the system of ventilation was also changed. Since there was no plan drawing to cover these changes, Mr. Brunatti believed that a violation of section 75.316 occurred. He also alluded to the criteria for ventilation plan approval found in section 75.316-1, and confirmed that the essence of the violation lies in the fact that the respondent changed its mining system and failed to submit a ventilation plan to correspond with that change (Tr. 59-66).

Mr. Brunatti stated that when he discussed the citation with Mr. Lowmaster and Mr. Cocora outside the mine, they went through the ventilation plans and tried to find a drawing for the D-5 section, and they admitted that they had no plan to cover the area in question (Tr. 73). Mr. Brunatti identified exhibit R-2 as a face ventilation plan, and confirmed that it was a part of ventilation plan Review 28 which was in effect at the time the citation was issued. He described what is depicted in that plan as "a working section completely separated and isolated from a gob on the right side by permanent stoppings and pillar mining being done on the left off the intake side, not connecting the gobs, but leaving a separation by the use of permanent stoppings and bradishes" (Tr. 74). He elaborated further by stating that "The area on the right side of that section had been pillared out at one time and now has been separated by permanent stoppings. In essence you've created, you have two gobs there" (Tr. 75).

Mr. Brunatti totally disagreed that exhibit R-2 depicts the system of mining and ventilation in use at the time of his inspection, and confirmed that what he observed is what is depicted in exhibit G-4, pg. 3, the plan which was submitted to abate the violation (Tr. 77). Mr. Brunatti stated that he could not specifically recall whether Mr. Lowmaster, Mr. DeSalvo, or Mr. Cocora produced exhibit R-2 during their discussions, and he believed "they were just grabbing for straws for something that they thought would cover" what they were doing. Even if they had produced exhibit R-2, Mr. Brunatti still believed it did not cover what was going on in the D-5 section (Tr. 79). Mr. Brunatti stated that no one can tell from exhibit R-2 when the pillars on the right and left side were pulled, and that is why it does not pertain to the system of mining taking place. He also indicated that the print shows two gobs being totally separated with permanent stoppings and with blocks of coal left in, while the system of mining actually taking place on August 5, on the D-5 section, was not leaving a row of coal blocks or stoppings (Tr. 80).

Mr. Brunatti further explained the differences between the ventilation system he observed on August 5, and what is depicted on exhibit R-2, and pointed out that one of the differences was that no permanent separation was being maintained between the two gob areas as it is depicted on the print (Tr. 85-89). He also explained what he considered to be major differences in R-2 and G-4 (Tr. 95-101; 104-106).

Mr. Brunatti confirmed that the respondent could continue to use the face print used to abate the violation, exhibit G-4, pg. 3, if they start mining elsewhere as long as the same system of mining is used. He explained the meaning of "same system" as follows (Tr. 103):

THE WITNESS: If they're just going to drive entries up and room and pillar to the right side or the return side, that would be a one-face print for that, just showing that, how they'll ventilate that section plus assure positive pressure from the section to the gob.

Now, if they want to go up and do that and then pull pillars coming back out, then they need a face print to show not only how they'll ventilate the section, but also how they'll assure ventilation to that gob to keep the air off the section from the gob air.

Mr. Brunatti explained further that in order for plan print R-2 to be effective, once pillarizing started on the left side, a row of permanent stoppings must be in place to prevent the air from the right side from coming into the left. There was no way this could have been done on August 5, because pillarizing was taking place across the section without leaving any separation, and any variation in the prints would require prior MSHA approval because the system of ventilation was changed and the plan is supposed to reflect the system of mining as well as the system of ventilation being incorporated (Tr. 106-107). Mr. Brunatti confirmed that prints R-1 and R-2, both reflect the same system of mining, namely, retreat pillar mining. However, the conditions which prevailed on August 5, were different from those reflected in R-2 (Tr. 109).

MSHA Inspector and Ventilation Specialist Richard Zilka, testified as to his experience and duties, which include the review of all mine ventilation plans in MSHA District No. 2. He confirmed that he holds a degree in mining engineering from the University of Pittsburgh. He stated that he reviews all addendums to mine ventilation plans which are required to be submitted every 6 months, including changes in ventilation, and he explained the procedures for this review (Tr. 118-122).

Mr. Zilka stated that his review of ventilation prints R-2 and R-1 indicates significant differences in the manner in which the two gobs are being ventilated, and that it would require a change or an addendum to be mining as the two

prints indicate. Assuming that print R-1 accurately reflects what was taking place on August 5, print R-2 would not as a matter of policy in his district be an acceptable face print to cover that situation (Tr. 123). In explaining the respondent's plan "variations" provided for in R-3, Mr. Zilka stated as follows (Tr. 124-126):

A. The variations that they're talking about would be considering, if you have a five-entry system you submit one plan that shows you mining say, Number 1 Entry, and the Number 2, 3, 4 Entries, how the back checks are set up so it's ventilated while they're mining the Number 1 Entry.

Variations is that we wouldn't require them to show how Number 2 Entry's being mined, Number 3 Entry and Number 4, repetitive. These are variations. We don't require that. One face print would suffice for that.

Q. The differences that you have noted, and I think you stated it as mainly the permanent stopping between R-2, that is shown on R-2 and the abatement plan that is shown on Government Exhibit 4; are you following me?

A. Yes.

Q. Would that be the kind of variation that the company could do by themselves?

A. Not according to District policy, it would not be accepted.

Q. Now, you talk about District policy. Do you have reason to believe that Greenwich Number 1 Mine or R & P Coal Company is familiar with District policy?

A. Yes. On numerous occasions, the situation of how face prints, what are to be on face prints and addendums to them to be submitted have been discussed with R & P personnel on numerous occasions.

Q. Have you had such discussions with R & P personnel?

A. Yes.

Q. Have you had such discussions prior to the time that this citation order was issued in August of 1986?

A. Yes.

Mr. Zilka stated that based on his conversations with respondent's personnel, they should have been aware of the fact that print R-2 was unacceptable for what was going on in the section on August 5. He explained that the system for ventilating the gob should be marked down accurately to assure that there is no chance of gob air containing high methane or black damp coming back on the miners. He indicated that one of the primary differences between prints R-2 and R-1 is the differences between how one ventilates two gobs separately as opposed to ventilating one gob (Tr. 128).

Mr. Zilka identified exhibit G-5 as 1983 cover letters concerning an overall packet of ventilation plans submitted to MSHA's District Office by the respondent covering all of its mines. Included in the packet were the specific plans for each mine which were submitted every 6 months. However, the respondent was still required to submit new plan addendums when changes in the system of mining and ventilation occurred, and this is reflected in the correspondence (Tr. 129-132). In response to further questions, Mr. Zilka stated (Tr. 132-134):

Q. Let's assume that a company is using pillar mining on one side and pillar mining on the other side of an entry. And let's assume that they are always pillar mining but that their system of ventilation changes from one side to the other.

Does not the District Office, would they or would they not consider it a violation of 75.316 not to submit a face print for the other side of the entry?

A. Absolutely; Just because you're pillar mining does not mean that your face ventilation plan is exactly the same every time, especially if you're pillarizing, if you're driving entries and you're mining on the right and pulling those pillars on the right side or pillarizing on the left side; you could change the ventilation, you could be taking the air

up on the right side and dumping it or when you're mining on the left you could still be doing the same thing but in--. It would be different, let me assure you.

Q. When you say it would be different, what would be different?

A. The face ventilation system, how you're ventilating the gob area, either to the left or the right of you.

Q. And under 75.316, would a company be required to submit a face print for that next section?

A. Yes.

Q. Even if they were using pillar mining in both sections?

A. Even if they're using pillar mining. If they're using a different ventilation system, the way they're setting it up and ventilating the gobs, they would have to submit a new plan.

Mr. Zilka confirmed that in an effort to reduce the amount of paperwork being submitted by the respondent with respect to its ventilation plans, the respondent was requested to eliminate those face prints which were not being used and to submit them at the time they intended to use them (Tr. 136). Mr. Zilka stated that he has "briefly looked at" plan Review 28, and based on the conditions cited by Inspector Brunatti as a violation in this case, he could find no face print which would correspond to the ventilation which existed on August 5, 1986 (Tr. 138). Mr. Zilka agreed that Mr. Brunatti's order was in compliance with MSHA district policy, and he confirmed that as a matter of policy, the mine ventilation system is considered to be a part of the mining system, and that the respondent is aware of this (Tr. 139-142).

On cross-examination, Mr. Zilka confirmed that regardless of the same mining system being followed in a mine, ventilation systems vary even though the mining system may stay consistent. Prints R-2 and R-1 reflect plans for ventilating two separate gobs, and he believed that both have been approved by the district manager (Tr. 143-146). A "typical"

face plan is one that shows how the face area is being ventilated, and if there is any deviation from that plan, another plan has to be submitted for approval (Tr. 154).

Mr. Zilka was of the opinion that the respondent could not use face print R-2 as a typical print for the conditions observed by Mr. Brunatti, and as shown in print R-1, because the two prints contain different ventilation systems (Tr. 161). Mr. Zilka confirmed that his understanding of the violation is that Mr. Brunatti found the respondent in full retreat pillar mining on August 5th with no ventilation plan to cover what was going on (Tr. 169). Face print R-2, would not apply because it shows a different system of ventilation with two gob areas separated by a stopping going all the way up to the face (Tr. 179).

In response to further questions, Mr. Zilka confirmed that he did not discuss face print R-2 with the respondent, but has discussed similar prints and changes that may occur. He discussed the matter with Mr. Onuscheck after the violation was issued and advised him that face prints could not be mixed, and that print R-2 was not acceptable in a situation where one is pillar mining on the right side and then goes over to the left side and starts pillarizing and pulling back (Tr. 183-184).

Respondent's Testimony and Evidence

Joseph N. DeSalvo, testified as to his background and experience, and confirmed that he is employed by the respondent as a safety inspector. He holds a B.S. degree in education from Indiana, Pennsylvania University. He confirmed that he accompanied Inspector Brunatti during his inspection on August 5, 1986. He identified print R-1, which is identical to G-4, as a diagram of how the D-5 section looked on the day of the inspection, and he described what he and Mr. Brunatti did by reference to an enlarged copy of R-1 (Tr. 186-191).

Mr. DeSalvo confirmed that face print R-1 depicts the system of mining and the system of ventilation on the D-5 section on the day of the inspection, and he stated that the print was submitted after Mr. Brunatti issued the violation, and it was approved at that time as part of the ventilation plan (Tr. 192). Mr. DeSalvo stated that while underground, he advised Mr. Brunatti of his view that the manner in which the gob was being ventilated "was the best possible way that it could be ventilated," and that Mr. Brunatti agreed with him (Tr. 193). They then went to the surface and discussed

the matter with superintendent Lowmaster and division manager Cocora. Upon review of the face prints contained in plan Review 28, management came to the conclusion that face print R-2 reflected what was taking place in the D-5 section, and this opinion was conveyed to Mr. Brunatti, but he disagreed (Tr. 194-195).

On cross-examination, Mr. DeSalvo confirmed that Mr. Brunatti reviewed the face prints produced by mine management before issuing the citation, and that the "whole packet" of prints was reviewed. However, management concluded that R-2 "applied the best" (Tr. 197). When asked why management would not specifically know which face print applied, rather than going over the entire package to find one which may have applied, Mr. DeSalvo responded "I don't really specialize in those plans, neither do people like Mr. Lowmaster. * * * that particular day we did try to contact the ventilation engineer at the mine, and he was unavailable for certain reasons, but we were not the specialists in ventilation" (Tr. 197). Mr. DeSalvo confirmed that prior to the group discussion concerning the prints, he had not seen Review 28 (Tr. 198). When asked whether Mr. Lowmaster was surprised concerning the prints in Review 28, Mr. DeSalvo responded "in the past we had submitted more specific drawings, and I think that may have been a bit of surprise to Mr. Lowmaster, but I don't think the packet itself" (Tr. 199). When asked why the respondent stopped submitting more specific prints, Mr. DeSalvo responded "I really don't get involved in that end of it" (Tr. 199).

Mr. DeSalvo conceded that face print R-2 is less specific than prints submitted in the past, and it does not specify that it is a drawing for the D-5 section. In response to further questions, Mr. DeSalvo stated as follows (Tr. 199-200):

Q. Isn't it true that Mr. Lowmaster said when you came up above ground to Sam that the prints didn't match their mining system that was going on at the time?

A. I remember Mr. Lowmaster saying something similar to that, but I'm sure, the context that I took what Mr. Lowmaster was saying in was I believe at that time the packet contained somewhere around 20 or 25 prints, and we were operating five sections. So, many of the prints really didn't apply to the number of sections that we had.

Q. Do you have any idea from the conversations that were going on between Sam and Mr. Lowmaster at the mine, whether Mr. Lowmaster had indicated that he had ever seen Review 28 before, the prints in Review 28?

A. I don't honestly recall Mr. Lowmaster saying that, but then I wasn't in the room all the time.

Mr. DeSalvo confirmed that all of the blocks of coal shown across the top of the section on R-1 had been pillared and mined at the time of the inspection, and that the area to the right side of the print was a mined-out gob area, but there was no separation between the two gob areas (Tr. 202-203). Mr. DeSalvo stated that there was "very little difference" between prints R-1 and R-2, and that R-2 "is close enough" to what was going on in the D-5 section (Tr. 205-206). He then stated that there are definitely differences, and though he is not a ventilation specialist, his understanding as a miner of the basic ventilation of a mine indicates to him that the ventilation shown in R-1 and R-2 is the same (Tr. 206). Mr. DeSalvo confirmed that while the stoppings shown on R-2 are needed, he could not explain why because he did not participate in the drafting of that print (Tr. 210). Although the prints look the same, he was not sure why the coal blocks shown in R-2 were left as shown, but agreed that if mining continued in the same area they would eventually be pulled (Tr. 211).

Mr. DeSalvo confirmed that the respondent has previously been cited for ventilation plan violations under circumstances similar to those in the instant case, but he could not recall the details of those prior citations. He recalled one citation issued by Mr. Brunatti subsequent to the one issued in this case for failing to change a plan or submit a print (Tr. 212-213).

William Onuscheck, respondent's Ventilation Engineer, testified as to his education, ventilation training, and experience. He confirmed that plan Review 28 contains typical rather than specific face plans, and confirmed that the respondent does not submit specific ventilation plans pertaining to the ventilation employed on any particular mine section. He stated that at one time, the respondent submitted specific plans to MSHA, but this became cumbersome. He identified exhibit R-5, which was not offered and received as part of the record in this case, as a "binder" containing ventilation plans which was submitted to MSHA's district

office on May 10, 1983. The exchange of correspondence concerning this binder is reflected in exhibit G-5. The binder contained an accumulation of all previously submitted and approved face prints (Tr. 214-221).

Mr. Onuscheck explained that the prior procedure of submitting specific face plans to be added to the binder resulted in practical paperwork problems and delays in having plans approved. As a consequence, he met with MSHA's District Manager Huntley, and they worked out a different system for submitting ventilation plans, namely the submission of "typical plans." Subsequent meetings with Mr. Emil Piontek, Mr. Zilka's co-worker in MSHA's ventilation department, resulted in the formulation of a typical packet of face ventilation plans covering the driving of entries, rooms, stumping, driving rooms and entries with multiple splits, and advance and retreat stumping of rooms. All of these typical plans are incorporated as part of Review 28, and there are 20 such plans, one of which is R-2 (Tr. 221-222). Mr. Onuscheck identified a copy of a letter dated December 12, 1984, addressed to Mr. Huntley, submitting two packets of typical face ventilation plans used in the respondent's mines (Tr. 224). Plan R-2 was among the packets submitted, and it was also submitted as part of Review 28 for the Greenwich No. 1 Mine in February, 1986, and subsequently approved by MSHA on June 4, 1986 (Tr. 225).

MSHA's counsel disputed any assertion or inference that MSHA accepted the binder as the respondent's ventilation plan. Counsel asserted that the binder was simply acknowledged as part of the effort to cut down on paperwork, but that MSHA made it clear to the respondent that specific face ventilation plans needed to be submitted and "it never was acceptable to the district office that you just submit a general plan and then go do whatever you want as a variation of that plan" (Tr. 227). Mr. Onuscheck further explained as follows (Tr. 229-230):

THE WITNESS: Yes, and I don't want to give you a false impression, even with the binder there were times when we would be mining, even with all those plans, we still wouldn't have a plan incorporated into the binder for the type of mining we were doing.

JUDGE KOUTRAS: That's right, what would you do then?

THE WITNESS: So we would have to keep on submitting.

JUDGE KOUTRAS: Submitting?

THE WITNESS: Yes, so if we kept on, at this point our binder would, we'd probably have four of those by now. Which, at which point, we went to the typical, 20 typicals instead of the binder.

MSHA's counsel confirmed that while the binder was not acceptable to MSHA's District office, the "typical packets" were acceptable. However, if there is a change in the mining or ventilation systems, a new plan would still have to be submitted. Counsel explained the meaning of a "typical plan" as follows (Tr. 234-235):

MS. HENRY: Your Honor, I think it's been well established by Mr. Zilka's testimony, that he informed R & P representatives of this numerous times, of what MSHA's definition of what typical was.

JUDGE KOUTRAS: Which was?

MS. HENRY: That typical means you can use a plan, and let's say you're driving up one entry, you use that plan. I want to make sure I'm getting this right. You start going up the second entry and it's the same thing, you may use that plan again.

Or if you're pillarizing out one block, you have particular plans, and you go to pillar the next block, you can use that plan.

It doesn't mean that in situations where you create a gob where no gob was before you can use that plan.

JUDGE KOUTRAS: Well let me ask you this: Is the bone of contention here that on the one hand Mr. Brunatti believes there were two separate, distinct gob areas on August the 5th --

MS. HENRY: No, you have it reversed. There are two separate, distinct gob areas shown on the face print that they tried to pass off.

JUDGE KOUTRAS: On the face print, but they didn't have two separate --

MS. HENRY: They didn't have two separate gob --

JUDGE KOUTRAS: They just had one?

MS. HENRY: Right.

JUDGE KOUTRAS: They didn't have a sketch for that?

MS. HENRY: Right.

JUDGE KOUTRAS: And that's the violation?

MS. HENRY: That's it in a nutshell.

And, at (Tr. 238-241):

* * * * *

JUDGE KOUTRAS: Couldn't the conditions change from day-to-day?

MS. HENRY: These conditions had changed, obviously small conditions could change from day-to-day, but the act of creating one gob and going over to the intake section and minning the intake section is the kind of, as there was testimony, is a kind of major variation, a kind of major change that requires a new face print.

* * * * *

MS. HENRY: A typical plan. We're saying that Greenwich has, and R & P has been informed, it's not like they're left out there to dry in

Informed of what?

bout what typical means.
d that.

Well, what does it mean?

MS. HENRY: It means that if you, on certain limited circumstances such as mining entry-by-entry or block-by-block --

JUDGE KOUTRAS: Right.

MS. HENRY: -- you can use the same plan without submitting a new one. It does not mean that if you go from the return side of the entry to the intake side of the entry and start mining there that you can use the print that they were claiming applied.

Mr. Onuscheck stated that since the submission of the typical plans, and prior to the respondent's dealings with MSHA's Hastings field office, the respondent has mined approximately 15 million tons of coal, and no one has ever questioned the use of the typical face plans even though various mining methods were used. He indicated that in the year and a half prior to the issuance of the citation by Mr. Brunatti, the use of typical face plans was not an issue. He believed that the Hastings field office was unfamiliar with the use of the typical face plans, but since the district manager accepted them, he further believed that the respondent has complied with the requirements of section 75.316 (Tr. 241-242).

Mr. Onuscheck confirmed that face print R-2 is the plan that was submitted by the respondent when it submitted its original typical plans, as well as later when it submitted Review 28 for the No. 1 Mine. He identified print R-1 as the plan submitted to abate the violation issued by Mr. Brunatti. He described the similarities and differences in the two plans, and while he conceded that there are differences in the manner in which the gob is being ventilated, he did not believe that they are significant (Tr. 254-256). He confirmed that R-2 depicts what was going on on the D-5 section in terms of pillar mining and ventilation at the time the violation was issued (Tr. 257).

On cross-examination, Mr. Onuscheck stated that once a typical plan is filed and approved by MSHA, the ventilation direction could be changed without notifying MSHA or submitting another plan, because to do otherwise would require a new plan every day or every hour. He did not believe that finishing one gob on one side of the entry and starting another gob on the other side is important enough to require the submission of a new plan (Tr. 259). He confirmed that

during his conversation with Mr. Brunatti, they discussed "typical" plans as compared to "specific" plans, and that when he asked Mr. Brunatti why he issued the citation, Mr. Brunatti responded that there was no plan explaining exactly what was going on in the D-5 section (Tr. 261). Mr. Onuscheck stated that he believed he was complying with a variation of plan R-2, but not the exact plan, and that Mr. Brunatti insisted that he was not complying with "an exact replica of what we were doing." In order to do this, up-to-date maps, rather than plans would have to be submitted, and this was done to abate the violation (Tr. 262). Mr. Onuscheck confirmed that R-2 "is close to" what was going on in the D-5 section when the citation was issued (Tr. 263).

Mr. Onuscheck confirmed that face print R-2 was not submitted to abate the violation, even though it had previously been accepted by the district office, and represented what was going on in the D-5 section, because he believed an order may have been issued by Mr. Brunatti. Rather than argue about it, and to achieve abatement as fast as possible, "it was simple just to make up a plan and send it in to abate the violation" (Tr. 279).

Mr. Onuscheck confirmed that the plan binder previously referred to consisted of previously submitted and approved face plans, and that it was put together as a matter of convenience for the district office and "we just listed them and instead of sending down 40 face prints for whatever mine it was, we just listed the numbers" (Tr. 282). Mr. Onuscheck confirmed that prior to Mr. Brunatti's citation, pillars had been pulled and extracted utilizing print R-2. With regard to the prior submissions of the typical plans, he stated as follows (Tr. 284-286):

Q. So it's true, then, that those plans that you drew up were not specific for Greenwich Mine; in fact, when you drew them up you didn't even have Greenwich in mind since Greenwich is not under R & P's direction?

A. Right. At the time we didn't have Greenwich in mind. When we took over, and we made studies of the Greenwich Mine prior to taking over, we spent, oh, I'd say a month up there, a good month going over their plans and how they mined and everything.

Their type of mining was very similar to ours. We tailored a typical plan and added

two other face plans to our typical. In addition to the typical we added two other plans, because mine management said that, you know, these, we want to put them in with your typicals.

Q. Were you mining D-5 at the time, Section D-5?

A. When we started managing; no.

Q. Mr. Onuscheck, do you understand that the use of a typical face plan has been established by the testimony from Mr. Zilka, means only mining from entry-to-entry or from block-to-block, that it does not cover a situation where you go over from an intake side to a return side?

A. No, ma'am. Without hearing his testimony I don't agree that it's just, how did you say, adding an entry?

Q. Yes, either adding an entry or going from block-to-block, those are the only cases in which you could use a typical plan?

A. No, we take the opinion that we, you can vary a lot more than just that.

Q. But hasn't MSHA told you that you can't vary a lot more than that, that that's the only variance you can have under typical plans?

A. We hear a lot of things from MSHA, ma'am, I don't know if they've ever said, specified how far you can go.

Q. Has MSHA ever told you that you're varying too much on the typical plans, that you can't vary as much on your typical plans?

A. Prior to Sam's violation, I don't think they did. Now, recently, they have been questioning the face plans, the typical face plans quite a bit in the last couple of months, or I'd say even the last half of year. But prior to Sam's violation, I don't believe they had.

Michael Ondecko, stated that he is employed by the respondent as a ventilation engineer, holds a B.S. degree in mining engineering from the Penn State University, and he testified as to his experience and duties. He confirmed that he and Mr. Onuscheck worked together in the preparation and submission of plan Review 28, and the face print packet that was part of that plan. Mr. Ondecko identified exhibit R-2 as a page from the packet submitted with plan Review 28 that was submitted and approved by MSHA. R-1 is the addendum which was sent in to abate the citation issued by Mr. Brunatti, and R-2 is a face print which had previously been submitted and approved, and it was in effect at the time the citation was issued (Tr. 303-307).

Mr. Ondecko explained what he believed to be the similarities and differences in face prints R-1 and R-2, and he stated that had Mr. Brunatti been on the section a week or two prior to his inspection, he would not have observed as much gob being extracted, and at that time the two prints would have been very similar. He indicated that without the extraction of the five stumps which he identified between the No. 11 and No. 12 rooms on face print R-2, the two prints would look the same. In his opinion, there was no need to send in a new face print for the specific location because it was already covered in print R-2. He confirmed that the only difference in the two prints is the amount of mining which is taking place. Otherwise, they would perhaps be identical (Tr. 307-311).

In response to a question as to the ventilation directional arrows shown on R-1, indicating that return air was going to the right, Mr. Ondecko stated as follows (Tr. 311-313):

Q. * * * And the question was if we show the air going to the right, why do we think we can move the air in another direction. Do you have an answer for that question?

A. Possibly to clarify that, it is, when these face prints are sent in they're to show general face ventilation patterns. It's not uncommon for some of our sections to have two, three thousand feet of gob area, and it's not uncommon for air to come out of a crosscut in the opposite direction as shown on the map.

But it does not, in any fact, say that we're ventilating the gob any differently, we're still pressurizing the gob and we're loosing, when MSHA is looking at this plan, they're looking at the general plan that may show the ventilation pattern is going in the same direction.

And we've had instances at 'out mines where violations have been vacated because of an air directional arrow in, say, one crosscut out of eight was going in the wrong direction.

And Pittsburgh has said that you show the basic ventilation pattern; we can't hold you down to every crosscut that has ventilation coming out of that crosscut.

But there are certain situations where gob will tighten up here, (indicating) and not be as tight here to where you can only control that gob with canvas checks and do the best you can to pressurize your gob.

And in some cases you will have air flow coming out in the opposite direction, but it doesn't say that you're still not pressurizing the system. Okay, the system is still functioning properly.

On cross-examination, Mr. Ondecko confirmed that he was not at the mine when the citation was issued. He agreed that the ventilation plan states that air flow must be maintained over the gobs so that it is course away from the active working section. He indicated that there are times when all of the air does not go away from the working section, and all that is required to be shown on a plan is a general ventilation pattern (Tr. 313). Mr. Ondecko stated that it was possible that Mr. Zilka may have advised him that a ventilation plan showing a double split of air could not be used as the same plan for a single split of air, but he could not recall such a conversation (Tr. 314).

Rebuttal Testimony

Inspector Brunatti testified that any "system of mining" necessarily includes a "system of ventilation," and that the two go hand-in-hand. In his view, the term "typical plan" means one that is approved for a particular mine, and that

section 75.316-2 makes it clear that a typical mining method should correspond with a typical ventilation pattern on a mine-by-mine basis (Tr. 316). He reiterated his disagreement that face print R-2 could be used in mining across the stumps shown in print R-1, and no ventilation controls are shown on R-2 so as to control the air going to the gob being created by mining across the area and taking out the stumps (Tr. 316-321). He confirmed that when he spoke with Mr. Onuscheck by phone, face print R-2 was not mentioned, and when he advised Mr. Onuscheck that there was no print to correspond with the mining taking place "he left me with the understanding he'd get one in and get it submitted" (Tr. 322). Mr. Brunatti confirmed that even if Mr. Onuscheck had produced print R-2, he would have rejected it because it was totally unrelated to the mining which was taking place (Tr. 323).

Referring to an enlarged diagram of face print R-1, Mr. Brunatti stated that the ventilation controls are different from those on R-2, and he explained how he determined that some of the air from the gob was leaking into the active working section, and how the gob pressure was other than that shown on R-2. In his view, had a proper face print been submitted, and the ventilation controls shown therein been followed, the air leakage problem would not have existed (Tr. 327-338).

Mr. Brunatti stated that at the time he discussed the citation with mine management at the mine, he was shown several face prints, and while some of them may have closely resembled the approved ventilation plan, none of them resembled the mining which was actually taking place. He denied that he insisted on a face print depicting exactly what was going on, and stated that he would have accepted any plan that reasonably approximated what was going on, but he does not consider R-2 to be such a reasonable approximation (Tr. 342-345). He confirmed that while district policy allows reasonable variations in the ventilation methods shown on face prints, if such variations affect the manner in which an area is being ventilated, or if changes are made in the direction of the air or in the system of mining, they would not be permitted without another plan to cover these changes. In the instant case, the system of mining had changed on the day of his inspection. Although a plan was approved to cover the time when the three room entries were initially driven and pillared off the return side of the section, they had no plan when they started across and began driving and pillaring rooms on the intake side. Such a new face print was required

to insure adequate ventilation over the intake gob area (Tr. 346).

Mr. Zilka testified that face print R-1 represents a ventilation system involving a double split of air, and he indicated that "Mr. Ondecko and Mr. Onuscheck and every ventilation engineer in the district has been told and informed since day one that a single split and a double split is totally different and there is no way that you can go from a single split to a double split without a ventilation change which requires an addendum" (Tr. 348). Inspector Brunatti agreed with Mr. Zilka (Tr. 369).

Mr. Ondecko disagreed that face print R-1 reflects a double split of air, and indicated that it is possible to find at least five or six splits of air on the print (Tr. 373-375).

MSHA's Arguments

MSHA asserts that a violation of section 75.316 occurred when Inspector Brunatti observed retreat mining performed in the D-5 section and the respondent did not have a face print to show how to ventilate the mined-out right side while mining the left side. MSHA asserts that this is a change in the "conditions and mining system" of the mine which requires appropriate revisions in the ventilation plan, and such changes include changes in the pattern of mining. To claim otherwise, argues MSHA, would render section 75.316 almost meaningless, for it would mean that operators need only submit changes in ventilation plans if they changed, for example, from pillar mining to longwall mining.

MSHA further asserts that the respondent cannot defend against the issuance of the citation by asserting collateral estoppel, because MSHA, in the issuance of a citation or order, is not bound by collateral estoppel. El Paso Rock Quarries, 2 MSHC 1133 (1981), King Knob Coal Co., 2 MSHC 1371, 1375 (1981), U.S. v. Browning, 630 F.2d 694 (10th Cir. 1980). MSHA, therefore, concludes that even if the respondent's arguments that they could institute variations in mining without corresponding face prints approval were credible, it is not a defense to the issuance of Inspector Brunatti's order. MSHA points out that Inspector Brunatti determined that the face prints submitted by the respondent, and shown to him on August 5, 1986, did not reflect the actual ventilation system in the mine, and further, did not show how such

retreat mining was to be ventilated in the future. MSHA concludes that this is a violation of section 75.316, which provides that ventilation plans shall correspond with the pattern of mining in any one area, and that any alleged previous belief that the respondent could modify its plans without prior approval is irrelevant as to whether the order was properly issued.

MSHA argues further that such a belief on the respondent's part exceeds credulity and that its negligence was properly rated as high. In support of this conclusion, MSHA points to the testimony of Richard Zilka, who reviews the ventilation plans for compliance at the District Office level, and who stated that he had explained the requirements of ventilation face prints to the respondent on several occasions. MSHA suggests that Mr. Zilka's testimony at trial was clear and consistent, and that his testimony that he was in almost daily contact with the respondent is uncontradicted. Mr. Zilka recalled the names of people to whom he had spoken as part of this daily contact, and clearly stated that the respondent expressed no confusion during these meetings; therefore, Zilka did not need to reduce such constant communication to writing. Mr. Zilka emphatically stated that his views represented those of the district, and that on the day the order was issued, respondent's engineer Onuscheck admitted that he knew he needed face prints for this new pattern of mining, and Mr. Brunatti recorded this conversation in his contemporaneous notes.

MSHA concludes that it has established a prima facie case of high negligence in that the respondent knew it was required to submit a new ventilation face print for this mining, and further knew and admitted that at the time of the order the prints in the ventilation plan did not cover the situation at the D-5 area. MSHA suggests that the respondent's current claims that it believed all the while that its prints were "close enough" to its mining system are contradicted by its employees' statements at the time of issuance of the citations and by Zilka's and Brunatti's explanation of MSHA policy. Although respondent referred to alleged statements made by District Manager Huntley, neither a deposition nor any written material from Huntley supports these allegations; rather the consistent, emphatic statements of Zilka and Brunatti disprove them.

MSHA maintains that the respondent's defense to negligence that it could vary plans on its own volition undercuts the very purpose of the Act. MSHA states that in addressing such arguments as the "diminution of safety" defense, the

Commission has rejected the argument that "an operator can unilaterally determine that a mining operation can be conducted in a safer manner by foregoing compliance with the requirements of a mandatory standard." Westmoreland Coal Co., 3 MSHC 1939, 1943 (1985). MSHA states that by arguing that the ventilation of one gob, the system in place the day Inspector Brunatti issued the inspection, may be regulated by a face print showing the ventilation of two gobs, the system revealed in Exhibit R-2, respondent suggests that it may determine what is and is not minor variation, and that it may determine if MSHA's safety standards are met. This argument, concludes MSHA, impermissibly contradicts the presumption that MSHA's safety standards protect miners and the "strict liability" nature of the Act itself. Therefore, MSHA further concludes that the respondent's arguments strain credulity and do not refute the testimony of Engineer Zilka and Inspector Brunatti that it was well informed as to the requirements of the ventilation plan regulations.

Citing Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), and Consolidation Coal Company, 6 FMSHRC 34 (January 1984), MSHA asserts that Inspector Brunatti properly rated the violation as significant and substantial.

MSHA points out that the Commission has recognized that the violation of a ventilation plan where "an insufficient quantity of air could lead to a build-up of methane" was a serious violation. Peabody Coal Co., 1 MSHC 1573 (1977), and has stated that ". . . the hazards associated with inadequate ventilation . . . are among the most serious in mining." Monterey Coal Co., 3 MSHC 1833, 1855 (1985). MSHA states that in Monterey the Commission reaffirmed that the proper focus of a hazard presented by a violation is not solely on the instant situation, but ". . . on the hazards posed by continuing mining operations." 3 MSHC at 1836. MSHA concludes that the violation in issue here meets those standards in that the face prints Mr. Brunatti reviewed did not show how to ventilate the area he inspected. As a result of the lack of an applicable face print, there was no plan to re-route the air leakage into the working section which endangered the miners, and Mr. Brunatti's contemporaneous notes support his observation on the existence of this leakage.

MSHA asserts that ventilation leakage causes methane and black damp, and therefore there was an underlying violation as a result of the lack of face prints and a discrete safety hazard from the leakage caused by such lack of a ventilation plan. The mere direction of air into the return entry is not

enough to overcome this safety hazard. The fact that the respondent would suggest that simply directing air into the entry, and not also directing it away from the working section complies with the Act, reveals a dangerous ignorance of the correct ventilation procedures. MSHA maintains that the air must be directed away from the working face as well as to the return airway. Otherwise, there is a reasonable likelihood that miners will be exposed to black damp and to accumulations of methane. These exposures lead to explosions which produce serious health injuries.

MSHA asserts that even if no leakage occurred that day, the order was still properly rated "S & S" in that a ventilation plan by its very nature is directed against future hazards. The mere fact that the air may happen to be flowing in the right direction without benefit of a ventilation plan does not assure that the air will continue to flow that way. In fact, the very presence of ventilation plan requirements in the MSHA regulations indicates that this system is too important to leave to the operator's good will, or to presume that air flowing in the "correct" direction will continue to do so in the absence of a ventilation plan. Such a presumption, maintains MSHA, undercuts the strict liability nature of the Act and the very existence of ventilation plan requirements.

MSHA asserts that such a presumption also trivializes the serious hazards associated with ventilation violations. Without a face print showing how pressure would be kept on the gob to direct air away from the face, respondent presented a discrete safety hazard to its miners. Without such a print to regulate ventilation, it is reasonably likely that dangerous gob air will travel to the face. In ventilation problems, the focus is on the effect of the violation on future mining, and not whether the air luckily travels in the "right" direction at the time of the order. Without a face print, the respondent cannot assure that gob air will flow away from the working section. Such gob air travelling to the working section will carry methane and black damp to the miners, raising a reasonable likelihood that miners will suffer serious injury. Thus, MSHA concludes that the order is properly rated significant and substantial.

Respondent's Arguments

Respondent's first argument is that the citation and subsequent modification do not properly, and with any particularity, advise the respondent as to the nature of the alleged violation. Respondent points out that although the citation

alleged that it did not have an approved ventilation plan showing the ventilation system for retreat mining in the cited area, the modification to the citation stated that it did have an approved ventilation plan for pillar mining in the same area prior to the issuance of the citation. Respondent contends that the modification discounts any notion that it did not have an approved ventilation plan, and that the citation and modification are contradictory.

In response to the inspector's statement in the modification that "the system of mining changed, thus necessitating a need for a new ventilation plan," the respondent contends that the inspector's attempt to substantiate a violation by stating that the system of mining had changed, thus necessitating the filing of a new ventilation face print, is contradicted by his own testimony that the system of mining employed was pillar mining. Respondent asserts that the terms "pillar mining" and "retreat mining" are interchangeable. It points out that while Inspector Brunatti attempted to distinguish pillar mining on the left and right sides of the cited area being mined, he nonetheless admitted that "pillar mining" is a "system" of mining, and that the respondent did have a face print, drawing #11 of the ventilation plan (Exhibit R-2), which did show pillar mining on the left side.

In response to Inspector Brunatti's testimony that "the essence of the violation is that the operator didn't have a plan to show how the ventilation would be established while retreat mining" (Tr. 45), respondent contends that this is contradicted by his written modification which states that it did have a plan for pillar mining in the cited area, and by his own testimony that the approved plan print showed gob ventilation in the section (Tr. 89).

Respondent contends that the attempts by Inspector Brunatti and MSHA's ventilation engineer Zilka to support a violation of section 75.316 because the face print submitted to abate the order (Exhibit R-1) shows one gob area and the face print in the ventilation plan (Exhibit R-2) shows two gobs, must be rejected. In support of this conclusion, respondent contends that this is not a violation of section 75.316, and that even if it were, respondent has never been informed in writing that the condition was a violation. Respondent points out that neither the citation nor the modification mentions gobs, and that it cannot even be inferred from the citation that gobs had anything to do with the violation. Since section 104(a) of the Act requires that the nature of the violation be described in writing with particularity, respondent concludes that the lack of any mention of

gobs in the citation violates the specificity requirements of section 104(a) when the nature of the violation is alleged to be a distinction between one gob and two gobs.

Citing a Commission decision in Jim Walter Resources, Inc., 1 FMSHRC 1827 (November 1979), respondent maintains that it was not sufficiently apprised of the nature of the violation to either litigate the alleged violation or cure any alleged deficiencies which might pose a hazard to miners. Respondent states that it became aware on the eve of the hearing that the violation involved a distinction between one and two gobs. Although Inspector Brunatti testified that he told the respondent that Drawing 11 (Exhibit R-2) of the ventilation plan did not apply, respondent asserts that there is no indication that he mentioned a distinction between gobs, and that no such distinction was ever related to the respondent in writing. Further, respondent states that although it requested more specific information with regard to the factual basis for the violation when it served prehearing interrogatories on the petitioner, the interrogatories were unanswered.

Respondent concedes that it was sufficiently apprised of the nature of the violation in order to abate the citation because all that was required to abate was a drawing of exactly what the section looked liked on the day in question, but that until the eve of the hearing, it was not aware of the one gob versus two gob distinction asserted as the basis of the violation. Recognizing the fact that abatement suggests knowledge of the violation, respondent maintains that this is not enough to satisfy the specificity requirements of section 104(a). In support of this conclusion, respondent relies on a prior decision by me in Monterey Coal Company, 6 FMSHRC 424, 444 (February 1984), vacating citations for lack of specificity as required by section 104(a), and it points out that in the instant case, aside from the face that the citation did not specifically mention gobs, it did not even generally allude to any gobs.

Respondent's second argument is that Drawing No. 11 of the approved ventilation plan (Exhibit R-2) portrayed the ventilation system in the cited section in sufficient detail to preclude a finding of a violation of section 75.316. Respondent takes the position that the inspector's allegation in the citation that a violation of section 75.316 occurred because the respondent did not have a ventilation plan showing the ventilation system for retreat mining is not true because in the modification the inspector admits that the respondent had an approved ventilation plan for pillar mining.

Respondent also takes the position that the inspector's testimony that a violation of section 75.316 occurred because of the lack of an approved face print to conduct that type of mining is also not true because the inspector admitted that the type of mining being conducted at all relevant times was pillar mining. Respondent further argues that the inspector's allegation that a violation existed because of the lack of a face print showing pillar mining on the left side is also not true because he admitted that there was a face print showing pillar mining on the left side.

Respondent concedes that the face print in the approved ventilation plan (Exhibit R-2) shows two gobs while the print submitted for abatement (Exhibit R-1) shows only one gob. However, respondent maintains that the petitioner has not shown that its regulations or the respondent's approved ventilation plan requires it to show the number of gobs in a section, and that it has not even shown that the respondent is required to show gobs on a face print. With respect to the inspector's suggestion that section 75.316-1(13)(b)(3) may serve as a basis for a violation of section 75.316, respondent points out that the inspector admitted that no violation of section 75.316-1(13)(b)(3) existed.

The respondent states that initially, the two gobs are only a temporary condition. It points out that respondent's ventilation engineer Onuscheck testified that the print in the approved plan had not shown any stumps extracted (Tr. 273), but that stumps would be extracted (Tr. 274), and that the inspector incorrectly assumed that the stumps would remain (Tr. 274-275). Respondent further points out that ventilation engineer Ondecko testified that once blocks have been extracted, one gob would result and the gobs would be identical (Tr. 308-309), and that Inspector Brunatti agreed that if the blocks are removed one big gob would result (Tr. 319). In these circumstances, respondent suggests that the issue is then whether it was required to have in the approved plan a face print showing each stage of mining and the removal of each stump as the two gobs evolve into one gob.

Respondent refers to the testimony of Mr. Onuscheck that MSHA's District Manager Huntley suggested to him that three plans would cover everything that was necessary; one print showing rooms being driven, one print showing entries being driven, and one print showing stumping (Tr. 221). Respondent concludes that this does not indicate that the District Manager required a face print showing the ventilation for each step in the mining process, and it points out that

Mr. Onuscheck, in conjunction with MSHA personnel, then formulated the packet of typical face prints that are presently submitted and approved as part of the ventilation plan (Tr. 222). There are twenty face prints in mine ventilation plan Review No. 28 which was in effect at the time in question, far more than the number suggested by MSHA's District Manager to cover the system of mining and ventilation employed at the respondent's mines. Mr. Ondecko then went over each print individually and tailored the packet of prints to conform to mining practices at Greenwich No. 1 Mine (Tr. 305), and the intent of the District Manager, Mr. Onuscheck, and the MSHA personnel with whom Mr. Onuscheck worked, was obviously to have general face prints. Respondent points out that MSHA ventilation engineer Zilka agreed that the District Office requested only face prints that were representative of the mining going on at the mine (Tr. 147), and that the prints submitted in Review No. 28 are a typical face ventilation plan for each system (Tr. 150).

Respondent maintains that a distinction must be made between general prints, as intended in this case, and universally applicable prints. Respondent recognizes the fact that the parties involved in the formulation of typical face prints are aware that ventilation plans are mine specific, Jim Walter Resources, Inc., 9 FMSHRC 903, 909 (May 1987), and that section 75.316 requires that the plan is "suitable to the conditions and the mining system of the coal mine." Respondent points out however, that Mr. Onuscheck and MSHA personnel from the District Office in Pittsburgh formulated the typical prints to conform to the conditions and mining systems at the respondent's mines, and that Mr. Ondecko further tailored the prints to conform to the conditions and mining practices at the Greenwich No. 1 Mine. Respondent concludes that the testimony shows that it did not violate that portion of section 75.316 which requires it to adopt a ventilation plan approved by the District Manager suitable to the conditions and the mining systems of the mine in question.

Respondent quotes a pertinent portion of section 75.316, which provides as follows: "The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require."

Respondent maintains that the petitioner has not shown or even alleged that a violation existed due to deficiencies in the ventilation equipment, and there are no allegations

that the quantity and velocity of air reaching each working face was unsatisfactory. Respondent concludes that it must be presumed that the plan initially contained enough information because it was approved by the District Manager, and the information submitted apparently was in compliance with section 75.316-1 and he presumably used the criteria set forth in section 75.316-2 as a guideline in the approval process.

Respondent observes that the petitioner is apparently alleging that it violated section 75.316 by not providing "such other information as the Secretary may require." Conceding the fact that MSHA may require additional information or ongoing information, the respondent nonetheless asserts that it must be informed as to the nature of the information required, and suggests that the petitioner alleges an act of "omission" rather than "commission." Respondent concludes that in order to be in violation due to omission it must first be required to do something and to have a duty to perform. In this case, respondent maintains that the petitioner has not shown that it had a duty to submit a new face print when the mining sequence showed two gobs rather than one, and that any such requirement cannot be found in the applicable MSHA regulations or in the specific ventilation plan for the mine in question. Respondent further asserts that the applicable plan does not require it to show the number of gobs.

In response to the petitioner's suggestion that it should have been aware that MSHA's District policy requires that a face print must be submitted when two gobs exist rather than one (Tr. 124-125, 134, 140-141), respondent points to the testimony of Mr. Onuscheck that he had requested District policy in written form but that he never received it (Tr. 287). Further, citing Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), and Carbon County Coal Company, 7 FMSHRC 1367, 1371 (September 1985), (cited as 6 FMSHRC 1123 (May 1984)), respondent maintains that since ventilation plans are mine specific, any MSHA District general policy regarding the requirements of a ventilation plan are improper. Respondent quotes from the Zeigler case, where the court stated:

[T]he plan idea was conceived for a quite narrow and specific purpose. It was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance at each mine. Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (1976).

And, from the Carbon County case, where the Commission, quoting from the Zeigler court decision, stated: "Insofar as those plans are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application."

Respondent asserts that if MSHA believes that more specific face prints are required as a general policy, then the proper procedure is to promulgate a regulation to that effect rather than attempt to impose the requirement across the board in each mine specific ventilation plan. Furthermore, the respondent asserts that its mine plan does not contain a provision requiring it to submit such specific information, but in fact contains a provision which expressly negates such a requirement, namely, Part "E" (Exhibit R-3), which provides as follows:

(2) TYPICAL FACE PRINTS

The following face ventilation plans depict typical systems of face ventilation used in the mine. Variations of the following plans may be used provided that the systems of ventilation remain in accordance with Federal Regulations.

Respondent points out that Inspector Brunatti, while stating that he was "fairly familiar with the ventilation plan" (Tr. 13), admitted that he was not familiar with Exhibit R-3 and that it was not a part of Review 28 because he could not find it in his copy of the ventilation plan (Tr. 81), and that District engineer Zilka testified that if the exhibit was not in Inspector Brunatti's plan, it was not filed in the District Office in Pittsburgh (Tr. 151). Contrary to this testimony, respondent states that Mr. Onuscheck and Mr. Ondecko testified that Exhibit R-3 was in fact a part of Review 28 of the approved ventilation plan (Tr. 245, 305-306), and that in response to a bench order for an affidavit from the responsible person in the MSHA District Office concerning the filing of the exhibit, petitioner's counsel confirmed that it was in fact on file in the District Office.

Respondent refutes the inspector's inferences that the respondent was not aware of its own ventilation plan, and takes issue with his testimony that when mine management

attempted to show him a print that showed the mining and ventilation system used on the cited section it was "grabbing at straws for something that they thought would cover" the situation. Conceding that this may be true, respondent asserts that the mine manager and safety director cannot be expected to be aware of all the technicalities of the face prints in the ventilation plan. If they were, there would be no need for ventilation personnel or for that matter any other management people. The mine manager could do everything himself. Respondent suggests that the only plausible way to operate such a complicated operation is to delegate some authority to responsible people, and that if Mr. Ondecko was available when the inspector asked for the print, Mr. Ondecko would have shown the inspector, as did those present, Drawing No. 11 (Exhibit R-2), without the alleged hesitancy.

In response to the inspector's testimony that Mr. Onuscheck had submitted a ventilation plan for review without mine level management's knowledge (Tr. 23, 27), respondent states that this is pure speculation and totally inaccurate, and that mine ventilation engineer Ondecko testified that he and Mr. Onuscheck formulated the packet of face prints, and that Mr. Ondecko went over each print individually to insure that it pertained to the mine in question (Tr. 305).

Respondent maintains that on the facts of this case, the inspector was attempting to enforce a ventilation plan that he knew very little about, that his copy of the plan, for whatever reason, did not contain Exhibit R-3, and that he was unaware of the procedure followed by the respondent and MSHA's District Office used to formulate the plan, which was to reduce the number of face prints that possibly could have been submitted from approximately 500 prints to the 20 prints that were submitted (Tr. 264). Respondent points out that the inspector admitted that mine management had some face prints that closely resembled the mining activity in the cited section, and that the mine is permitted to vary from the specific print in the ventilation plan (Tr. 342, 345). Mr. Onuscheck testified that the inspector wanted a plan that showed exactly what was going on in the mine (Tr. 261), but respondent takes the position that it was not the intent of MSHA or the respondent, the parties involved in the approval and adoption of the ventilation plan, that exact prints would be required. Respondent points out that Mr. Onuscheck testified that in the year and a half the typical prints were in use, respondent had mined approximately fifteen million tons of coal and had no problems with the face prints, and no other MSHA inspectors had ever questioned the manner in which

the respondent was mining (Tr. 241, 294). Respondent concludes that it was not the intent of the parties that detailed face prints were required as part of the ventilation plan.

Respondent maintains that Part "E" of plan Review No. 28 (exhibit R-3), as part of the approved ventilation plan, allows it leeway to vary from the drawings on the specific prints submitted as part of the plan, and that any such leeway is limited only by MSHA's ventilation regulations. Respondent asserts that the petitioner has not shown that there are other provisions in the mine ventilation plan which limits the respondent's right to vary from the print submitted, and it points out that Mr. Onuscheck testified that MSHA has never told the respondent that it was varying too much from the plans prior to the alleged violation in question (Tr. 286). Respondent further maintains that the petitioner has not shown that the variance has violated any other MSHA regulatory provisions, and has not shown that the respondent is required to submit more specific prints than the prints that were submitted in this case.

In response to the inspector's allegation that gob air was going into the section return (Tr. 18), respondent states that the petitioner has not shown that this constitutes a violation of the ventilation plan. To the contrary, respondent asserts that the credible evidence suggests that the gob air was moving in the proper direction (Tr. 191-192), Exhibit G-1), and observes that if it was not, the inspector would have included that finding in the citation or modification. In fact, this allegation is not mentioned in either the notice or the modification. Respondent takes the position that if the inspector thought this to be a violation, he should have properly included it in the citation. Respondent maintains that it serves no purpose to put such a finding in the inspector's notes where conceivably, if the citation was not challenged, no one would ever see the finding and the respondent would not have an opportunity to contradict the allegation, or more importantly, could not cure any alleged existing hazard.

Respondent concludes that the inspector's allegation that the gob air was improperly directed is nothing more than a bald assertion by the inspector, and that the respondent's mine safety inspector DeSalvo, who accompanied the inspector on the day in question testified that while the inspector took a smoke test, it showed that the air was not going back to where people were working (Tr. 191-192). Although the inspector had an opportunity to rebut Mr. DeSalvo's testimony, he simply testified that he normally does a smoke test, but he

could not recall if he did on the day in question (Tr. 370). Respondent concludes that a violation cannot stand on unsupported allegations that air was moving improperly, when the actions of the inspector and the testimony of an eyewitness suggest otherwise.

Respondent's final argument is the assertion that assuming a violation existed, it was not significant and substantial within the guidelines established by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981), and Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984).

Respondent points out that in the instant case the inspector alleged that "if the section isn't properly ventilated or the pressure isn't kept on the gob, you could have accumulations of methane in the gob area or, which could in essence come back into the working area" (Tr. 14, emphasis added). Respondent does not disagree with this statement, but takes the position that the petitioner has not shown that the section was improperly ventilated. Respondent maintains that the facts show that the entire testimony of inspector Brunatti and MSHA ventilation engineer Zilka, does not show that the ventilation system was improper, and neither witness even suggested that the section should have been ventilated differently than it was ventilated. The only testimony regarding the propriety of the ventilation system in use was that of Mr. DeSalvo who testified that he told Mr. Brunatti that he felt the way Greenwich was ventilating the gob area was the best possible way to ventilate it (Tr. 193), and that Inspector Brunatti agreed with this statement (Tr. 193). The inspector testified that he took methane readings at various locations, including the return, and found no problems or excessive levels of methane (Tr. 57-58).

Respondent suggests that it was not reasonably likely that an injury of a reasonably serious nature would result from a methane ignition when the section was ventilated in the best possible way and the particular facts show that there is no accumulation of methane. Even assuming that air was flowing improperly from the gob, the significant and substantial finding is not supported because it would be necessary to assume that methane would accumulate to combustible concentrations and assume that these concentrations would go undetected. It is also necessary to assume that the combustible concentrations would reach ignition sources. If a cable or electrical component is the asserted source of ignition, it is necessary to assume that a violation exists regarding the cable or electrical component which would cause a spark

and also assume that this violation was undetected by the inspector.

Respondent further argues that if the source of ignition is claimed to be the mining machine, it is necessary to assume that the methane monitor would fail to warn the machine operator, or the machine operator would not heed the warning, and assume that the methane monitor would fail to deenergize the equipment at the required time and assume that something produced a spark.

Respondent concludes that while the foregoing scenarios are possible, the likelihood of that chain of events occurring is so remote as to preclude any finding that there was a "reasonable likelihood" of the occurrence. Respondent believes that, even assuming gob air was moving improperly, and a possibility of an injury existed, that possibility would be so remote as to be unlikely, rather than reasonably likely to occur. Respondent points out that the inspector testified that if gob air was not going back into the section, the system of ventilation used was adequate for the system of mining employed, and that the hazard posed by simply not having a print in the plan was minimal, if any hazard at all (Tr. 46, 48).

Findings and Conclusions

Alleged Lack of Specificity of the Citation and Modification Thereto

Respondent raised the specificity issue for the first time when it filed its posthearing brief. While it may be true that MSHA did not respond to the respondent's prehearing interrogatories, filed on February 4, 1987, respondent had more than ample time prior to the hearing to file an objection or seek an order requiring MSHA to respond, but it did not do so. Respondent also failed to avail itself of a more than ample time to depose the inspector in advance of the hearing.

While it is true that the citation and modification do not specifically refer to gobs, respondent's counsel conceded that he was made aware of the "gob theory" of MSHA's case on the eve of the hearing. If counsel believed that he was unduly prejudiced in the preparation of his case, he could have requested a continuance of the hearing, but he did not do so. Further, the record here establishes that the citation was terminated and the violation was abated after Mr. Onuscheck hand delivered to MSHA a ventilation face print

covering the prevailing conditions at the time the citation was issued. This was done 2 days after the issuance of the citation. Mr. Onuscheck confirmed that he and Mr. Brunatti discussed the reasons for the issuance of the citation, and Mr. DeSalvo confirmed that before issuing the citation, Mr. Brunatti discussed the matter with the mine and division managers, and that they collectively reviewed the ventilation plans and prints which were available at the mine. Given all of these circumstances, I find it hard to believe that the respondent was unaware of the theory of MSHA's case.

Although the citation and modification issued by Mr. Brunatti appear to be contradictory, the modification makes it clear that while the respondent had an approved ventilation plan covering any retreat-pillar mining prior to the date of the inspection and issuance of the citation, Mr. Brunatti could find no evidence that any plan provision on file covering the particular conditions which prevailed on the day of his inspection. While it is true that Mr. Brunatti did not spell out the gob conditions that concerned him, he did state that "the system of mining changed thus necessitating a need for a new ventilation plan." His notes of August 4, 1986, reflect that Mr. DeSalvo admitted that the available face prints did not match the prevailing face ventilation system, and his notes of August 8, 1986, reflect that Mr. Onuscheck and mine management were aware of the need for new face prints. Mr. Brunatti's notes also reflect that the respondent had plans to pillar the return side of the cited area, that he observed the return side being pillared, and that mine superintendent Lowmaster acknowledged that he was not aware of any ventilation plan to cover that situation, as well as the lack of face prints to cover future mining, and that he would discuss the matter with Mr. Onuscheck.

Mr. Brunatti testified in detail with respect to the "changed mining system" referred to in his modified citation. In my view, while the use of the words "mining system," without further elaboration describing precisely what Mr. Brunatti had in mind, was a poor choice of language, Mr. Brunatti's testimony clarified the matter, and Mr. Brunatti was subjected to cross-examination by the respondent. Coupled with the detailed posthearing brief filed by the respondent, and the testimony adduced in this case, I find no basis for concluding that the respondent was oblivious to the theory of MSHA's case, or that it was prejudiced by Mr. Brunatti's failure to spell it all out on the face of the citation. Accordingly, respondent's assertions to the contrary ARE REJECTED, and its request that the citation, as modified, be vacated on the ground of lack of specificity IS DENIED.

Fact of Violation

The respondent is charged with an alleged violation of the ventilation system and methane and dust-control plan requirements of mandatory safety standard 30 C.F.R. § 75.316, which provides as follows:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

It seems clear that the intent and purpose of section 75.316, is to require a mine operator to adopt an MSHA approved ventilation plan which is tailored to and "suitable to the conditions and the mining system" of the particular mine where it is to apply. It is also clear that once approved and adopted, the ventilation plan and any revisions thereof, are enforceable as though they are mandatory safety standards. Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Carbon County Coal Company, 7 FMSHRC 1367 (September 1985); Jim Walter Resources, Inc., 9 FMSHRC 903 (May 1987).

Respondent's defense in this case is based on its assertion that ventilation face print R-2 is in fact the applicable ventilation plan face print which applied to the existing mining conditions at the time Mr. Brunatti inspected the D-5 section and issued his citation. Respondent maintains that even if the prevailing mining and ventilation conditions on that day were at variance from what is shown on the print, it is nonetheless permitted to vary from the print, on its own volition, and that it can change or vary the ventilation system without MSHA approval, or without submitting another print. Respondent is of the view that since MSHA has approved the use of "typical" prints, R-2 being one of them, such

prints need not reflect the actual mining conditions or ventilation system in use at any particular time. As examples, respondent maintains that assuming an inspector found some air leakage due to an inadequately ventilated gob, or found that the gobs were not separated by stoppings as reflected on any "typical" print, it may be cited for a violation of any applicable mandatory ventilation standard, but it may not be cited for a violation of section 75.316 for failing to have a specific ventilation plan face print to cover the prevailing mining and ventilation conditions.

The parties are in agreement that the terms "pillar mining" and "retreat mining" are synonymous. The respondent takes the position that the inspector's allegation in the citation that no plan provision existed showing the ventilation system for retreat mining in the cited area is contradicted by the modification to the citation where the inspector states that the respondent did have an approved ventilation plan for pillar mining. While it is true that the two statements, on their face, appear contradictory, the inspector's statements must be taken in context. The inspector qualified the statement which appears on the modification, and he clearly indicated that while the respondent may have had approved ventilation plans covering pillar and retreat mining, which may have taken place prior to his inspection, he could find no evidence of the existence of any applicable plans for what was taking place at the time of his inspection. Thus, the focus of the alleged violative conditions is properly on the inspector's belief that, notwithstanding the pillar or retreat mining ventilation procedures being followed in those past instances when other inspectors may have inspected the mine, the system of mining being followed on the day of his inspection was not the same, and that since conditions had changed, which either affected, or may reasonably be expected to affect, the ventilation in the section, an approved plan provision to cover the changed mining procedures and conditions was necessary.

The term "mining" is defined by the Dictionary of Mining, Mineral, and Related Terms, published by the Bureau of Mines, U.S. Department of the Interior, 1968 Edition, in part as "[T]he excavation made in undermining a coalface." The term "system" is defined by Webster's New Collegiate Dictionary, in part, as "an organized or established procedure or pattern." The term is also defined by the mining dictionary, in part as follows:

- d. Regular method or order; a plan. * * *

g. The term system or general system of work means simply that the work, as it is commenced * * * is such that, if continued, will lead to a * * development of the veins or ore bodies that are supposed to be in the claim, or, if these are known, that the work will facilitate the extraction of the ores and mineral. "

Mr. Brunatti confirmed that the "system" of mining being followed at the time of his inspection was retreat mining. He explained that after reaching the limits of the mined areas on the right return side of the entry, the mining cycle proceeded to the left intake side of the entry and pillars were being extracted, thereby creating one gob across the entire intake and return sides of the entry. Mr. Brunatti believed that with the completion of the pillarizing work on the right return side of the entry, the change of direction towards the left intake side of the entry where coal was being extracted constituted a change in the mining "system." It seems rather apparent to me that while Mr. Brunatti characterized the general "system" of mining taking place on the day of his inspection as retreat or pillar mining, he viewed the completed work which had taken place on the right return side of the entry, as well as the working being performed on the left intake side of the entry, as two distinct "systems of mining" within the overall "system" of retreat or pillar mining.

Inspector Brunatti's unrebutted testimony establishes that when he conducted his inspection, retreat mining was in progress in the D-5 working section. The return side of the entry, located on the right side, had already been mined, and rooms were being driven to the left off the intake side, on the left side of the entry. One row of pillars had already been extracted, and work was in progress extracting a second row of pillars at the time the inspector arrived on the scene. The inspector observed that the area was in full retreat, and that the mined-out return side to the right of the entry, which constituted a gob area, was not separated by stoppings from the area being extracted on the left intake side of the entry. The inspector described both sides of the entry as a "solid gob," and he did not believe that the section was being ventilated properly because he detected air leaking from the gob into the return side of the entry.

I conclude and find that the "system of mining" alluded to by Mr. Brunatti was the pillar retreat extraction work

taking place on the left intake side of the entry, further conclude and find that the work being performed at that time constituted a change in the mining system in that the work on the right side of the entry had been previously completed after the area had been driven to its planned limits, and at the time Mr. Brunatti arrived on the scene, a row of pillars had been extracted on the left intake side, and work was in progress extracting the second row of pillars.

Mr. Brunatti confirmed that the respondent had an approved ventilation plan to cover the driving and pillarizing of the rooms to the right return side of the entry. The essence of the alleged violation in this case lies in Mr. Brunatti's belief that the respondent did not have an approved ventilation plan or face print to cover the pillar work being conducted on the left intake side of the entry. In support of this belief, Mr. Brunatti pointed out that during his discussions with mine management officials, including a review of certain ventilation plans and face prints on file at the mine, the respondent could not produce any plan or print covering the procedures for ventilating the gob area which was created by the extraction of pillars on the left side of the entry. Mr. Brunatti also relied on what he believed to be ventilation engineer Onuscheck's admissions that the previously submitted mine ventilation plans did not correspond to the type of mining taking place in the D-5 section on the day of the day of the inspection, and Mr. Onuscheck's assurance that such a plan would be submitted to correspond with the mining which was taking place in order to abate the citation. Mr. Brunatti further relied on certain statements made to him by mine superintendent Lowmaster's and division superintendent Cocora's admissions that they had no ventilation plan to cover the D-5 section.

Respondent's safety director DeSalvo admitted that at the time inspector Brunatti reviewed with management the 20 to 25 ventilation face prints which were part of the approved mine ventilation plan, many of the prints did not match the five operating mine sections. Mr. DeSalvo also admitted that he had never seen the approved ventilation plan prior to the issuance of the citation, that face print R-2 is less specific from the prints submitted to MSHA in the past, and that the print does not specify on its face that it is applicable to the D-5 section. He also corroborated that superintendent Lowmaster said something to the effect that none of the prints reviewed by Mr. Brunatti matched the mining conditions which prevailed at the time the citation was issued.

Mr. DeSalvo's testimony regarding face prints R-1 and R-2 is contradictory. On the one hand, he testified that print R-1, which was filed to abate the violation, depicted the mining and ventilation system in place at the time the citation was issued. On the other hand, he testified that print R-2 depicted what was taking place at the time the citation was issued, and that it "applied the best," and was "close enough," if not identical to the mining and ventilation system depicted in R-1. Further, Mr. DeSalvo conceded that he and Mr. Lowmaster were not ventilation specialists, and he confirmed that he was not involved in the formulation and submission of ventilation plans or face prints.

I find little merit in the respondent's assertion that safety inspector DeSalvo and mine manager Lowmaster cannot be expected to be aware of "all the technicalities" of ventilation face prints. Aside from any "technicalities," one would expect the mine safety inspector and mine manager to at least have some basic knowledge as to the contents of ventilation plans and prints covering the prevailing mine conditions, and would at least know which plan was applicable at any given time.

Respondent's ventilation engineer Ondecko, who was not present when the citation was issued, believed that face print R-2 was the approved part of the plan in effect when the citation was issued. However, he conceded that there were differences in face prints R-1 and R-2, and he attributed these differences to the extent of the mining which had taken place at the time of the inspection. Since Mr. Ondecko did not view the prevailing conditions at the time the citations were issued, he could not rebut Inspector Brunatti's observations, as confirmed by Mr. DeSalvo, that the coal pillars on the left side of the entry were being mined in a manner which created one large gob area which was not separated by stoppings from the previously mined out right side gob area.

Mr. Ondecko contended that all that is required of the respondent is the submission of general ventilation plans and face prints showing the general mine ventilation pattern, and that specific ventilation face prints covering any particular mining method or system which is being followed at any given time are not required. Although he agreed that the mine ventilation plan requires that the ventilation air flow over the gob areas be maintained in such a manner as to insure that such gob air is coursed away from the active working section, he conceded that at times all of the gob air is not coursed away from the working section. He also conceded that it was not uncommon for the air used to ventilate a gob area to

course out of a crosscut in the opposite direction from that shown on a face print.

Respondent's ventilation engineer Onuscheck initially contended that face print R-2 represented the prevailing pillar mining conditions and ventilation plan at the time the citation was issued. When asked to explain why that particular face print was not submitted to abate the violation, rather than face print R-1, Mr. Onuscheck suggested that since Inspector Brunatti disagreed that print R-2 covered the conditions which he observed he would probably have issued an order for non-compliance if he submitted R-2 to cover the abatement. Mr. Onuscheck further suggested that he submitted print R-1 to expedite the abatement of the violation.

Notwithstanding his contention that face print R-2 depicted the prevailing conditions at the time the citation issued, and that it was the approved plan print covering those conditions, Mr. Onuscheck conceded that the print was only "close to" what was required, rather than the "exact plan" as depicted in R-1, and that the respondent was following a "variation" of print R-2. Further, Mr. Onuscheck's claim that MSHA had not previously questioned the use of "typical" face prints such as R-2 in the past, is contradicted by safety inspector DeSalvo's testimony that the respondent had in fact been previously cited for ventilation plan violations under circumstances similar to those in this case.

Respondent's counsel conceded that there are differences in face prints R-1 and R-2, but he considered them to be "insignificant." He also conceded that there were "small variations" between R-2 and the R-1 plan submitted to abate the violation (Tr. 77-78; 324). As an example of what he considered to be a "slight difference" in the two prints, counsel cited the ventilation directional arrows as shown on print R-1, which reflects a different directional flow of the air used to ventilate the gob than that shown on print R-2 (Tr. 92).

MSHA's ventilation specialist Zilka testified that there are significant differences in face prints R-1 and R-2, particularly with respect to how the two gobs are being ventilated. He confirmed that the driving of entries, and the pulling of pillars on the right and left sides entails changes in ventilation, and the face ventilation system used to ventilate the resulting gob areas would be different. On the facts of this case, Mr. Zilka was of the view that the respondent could not use face print R-2 as a "typical" face print for the conditions observed by Inspector Brunatti, as depicted in

"typical" face print R-1, because the two prints contain different ventilation systems, and print R-2 shows a different system of ventilation with two gob areas separated by a stopping going all the way to the face. Mr. Zilka concluded that under these circumstances, the respondent would be required by section 75.316, to submit a face print other than R-2 to cover the changed mining and ventilation conditions, and that its failure to do so constitutes a violation of that section.

I conclude and find that the preponderance of the credible evidence and testimony adduced in this case establishes that face print R-2, which the respondent maintains is applicable in this case as a "typical" print covering the conditions cited by Inspector Brunatti, clearly depicts two separate gob areas separated by stoppings, and I reject the respondent's assertion that it covers the cited conditions. I further conclude and find that the petitioner has established that face print R-1 accurately depicts the existing conditions as observed by Inspector Brunatti at the time he issued his citation, and it seems clear to me that his unrebuted testimony, and that of Mr. Zilka, which I find credible, clearly establishes that at the time of the inspection, the cited area was in the process of being pillared on the left side of the entry, and that one unseparated gob area was created with no stoppings isolating the right return side of the entry from the left intake side. I further conclude that the respondent had no approved face print, "typical" or otherwise, to cover the prevailing changed mining conditions and system in place at the time of the inspection.

Section 75.316 requires a mine operator to adopt a ventilation plan, including any revisions, suitable to the prevailing mine conditions and mining system, and to submit such plan to MSHA for approval. Further, the ventilation criteria found in section 75.316-1(b)(4), requires an operator to include in its proposed plan face ventilation systems and drawings depicting the use and application of the system under all anticipated mining conditions. On the facts of this case, the evidence establishes that the respondent has done neither. The "typical" face plan, R-2, which respondent maintains applied to its system of mining, did not conform to the actual mining which was taking place, and there is no credible evidence that the respondent had ever submitted an applicable specific face print until after the citation was issued.

The record in this case establishes that at the time the respondent's ventilation plan "binder" system was initiated, the respondent was not managing the subject mine, and the D-5 section was not being mined. A letter dated May 23, 1983,

from MSHA's District Manager Donald W. Huntley, (exhibit G-5), acknowledges the receipt of the binder containing multiple face ventilation plans which were applicable to the Keystone and Helvetia Coal Mining Companies. The letter also advised the respondent that it should list all face ventilation plans which were to be used at those mines for each 6-month ventilation review period, and that any proposed plans not in the binder or which have previously been approved by MSHA for use during any current plan review, should be submitted for approval prior to being implemented. In its May 10, 1983, letter submitting the binder, the respondent characterized the face prints which were included in the binder as illustrative ventilation systems to be utilized at the Keystone and Helvetia Mines which were being managed by the respondent at that time. The letter advised MSHA that: "In the event that a system of ventilation is to be used that is not contained in the folder, we will submit it as an addendum. After it is approved the new plan will be added to the folder." (Emphasis added).

Mr. Onuscheck confirmed that even with the submission of the binder, with its face prints, there were times when the respondent had no plan incorporated in the binder to cover the type of mining that it may have been engaged in, and in those instances, it was required to submit a face print to cover that system of mining not previously covered.

Mr. Onuscheck confirmed that at the time the respondent took over the management of the subject mine, the type of mining conducted was similar to that which had taken place at the others mines managed by the respondent. Although the D-5 section was not being mined at that time, additional "typical" face prints were tailored to the anticipated mining in the subject mine, and a group of 20 prints, including face print R-2 were submitted to MSHA as part of Ventilation Plan Review 28, (Exhibit R-3), and they were approved by MSHA on June 4, 1986. Contrary to Mr. Onuscheck's belief, I find no credible evidence that establishes that face print R-1 was included among the face print "packet" submitted to MSHA, and it seems clear to me from the testimony and evidence in this case that the face print was submitted by Mr. Onuscheck after the citation was issued in order to abate the violation. The record confirms that the face print was approved by MSHA and incorporated as part of plan 28 on August 7, 1986, 3 days after the citation was issued (Exhibit G-4).

After careful consideration of the arguments advanced by the parties with respect to the "typical face print" issue raised in this case, including the respondent's attempts to

use this a defense to the violation, I reject the respondent's arguments and conclude and find that MSHA has a more compelling argument, and that its position in response to the respondent's asserted defense of the violation is correct. While it may be true that the respondent's Plan Review 28, exhibit R-3, which is included as part of its omnibus ventilation plans on file with MSHA, contains a sentence seemingly authorizing variations from the "typical" face ventilation prints which were submitted and approved by MSHA, such authorization is qualified and conditional. This condition specifically mandates that any variations from the "typical" face prints, which I construe to mean "illustrative" or "representative examples," must insure that any future prints depicting mine systems of ventilation submitted by the respondent must comply with Federal Regulations. On the facts of this case, it seems clear to me that the lack of any applicable ventilation face print provision or plan to cover the changed mining conditions as found by Inspector Brunatti during his inspection was not in compliance with the clear language found in section 75.316, requiring the respondent to adopt a plan provision consistent with, and conforming to, the prevailing mining conditions at the time of the inspection.

I agree with MSHA's position that the acceptance of the respondent's "typical" face print argument would allow the respondent to deviate from its approved ventilation plan and face prints with no consideration given to the pattern of mining in existence at any given time, any changes in the ventilation system which necessarily are affected by such changes, the absence of ventilation stoppings clearly indicated in previously submitted face prints, the creation of additional gob areas not shown on previously submitted prints, and any clearly defined areas of anticipated mining and ventilation to insure that all ventilation requirements are met, and to guard against possible air leakage from the anticipated gob areas into the active workings of the mine. The evidence in this case establishes that at the time the respondent submitted its omnibus ventilation plans covering other mines which it managed, the same plans which it apparently incorporated by reference as covering the subject mine, it recognized its obligation to submit additional plans and face prints not previously filed for MSHA's approval, and that it was required to submit ventilation face prints covering any system of mining not previously covered.

In view of the foregoing, I conclude and find that MSHA has established a violation of section 75.316, by a preponderance of the credible evidence and testimony adduced in this case. Accordingly, the violation IS AFFIRMED.

Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

While it is true that Inspector Brunatti could not recall taking any smoke tests, and did not mention any air leakage in the citation and order, his testimony, which I find credible, and his contemporary notes of August 4, 1986, exhibit G-2, reflect that gob air was coming into the section. Mr. Brunatti testified that his belief that air was leaking off the gob was based on "sight and feel," and that he could "see it (air) on the canvas, the way the canvas, the pressure on the canvas, and you could fee the air" coming from the pillared gob area back into the section (Tr. 59, 370).

Respondent's reliance on Inspector Brunatti's testimony that the lack of a face print posed only a minimal, if any hazard at all, is rejected. That testimony came in response to a hypothetical question which assumed no air leakage and a proper ventilation system in place suitable to the prevailing mining conditions. Even if there were no air leakage, I agree with MSHA's position that the lack of a ventilation face print presented a discrete safety hazard to miners. The purpose of a ventilation plan and ventilation prints is to lay out the ventilation system for ongoing and future mining, and the means for insuring that adequate ventilation is available to carry away methane and other noxious gases from the active working areas of the mine. Such plans usually include the required quantities of air and pressures, and the ventilation system and equipment used to control and distribute the air throughout the areas where miners may be working. In the absence of any definitive ventilation plans or prints corresponding with the actual mining which may be taking place, and given the fact that changes in the mining system and prevailing conditions occur as the mining cycle advances or retreats, there is a real potential that air leakage will go undetected, that necessary corrections or adjustments to ventilation curtains, stoppings, or other means of maintaining and controlling the ventilation may not be taken into account, and that air pressures and air quantities will not be monitored to insure continued and uninhibited adequate ventilation in the working section. Should this occur, I believe it is reasonably likely that miners will be exposed to potentially dangerous and hazardous ventilation conditions of a reasonably serious nature likely to result in serious injuries.

On the facts of this case, the absence of a ventilation face print is particularly critical in terms of maintaining a continuous safe working environment for the miners. In this case, the respondent's own safety director admitted that at times all of the gob air is not coursed away from the working

section, that it was not uncommon for the air used to ventilate a gob area to course out of a crosscut in the opposite direction from that shown in the ventilation plan, and that he, and possibly the mine manager, were unaware of the applicable ventilation plan or face prints covering the mining conditions in place at the time of the inspection. Given all of the aforementioned circumstances, I conclude and find that the inspector's special "significant and substantial" finding was justified, and IT IS AFFIRMED.

The Unwarrantable Failure Issue

The governing definition of unwarrantable failure is still to be found in Zeigler Coal Company, 7 IBMA 280 (1977) decided under the 1969 Act which held in pertinent part as follows at 295-96:

In light of the foregoing, we hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

Zeigler was specifically approved during consideration of the 1977 Act. S. Rep. 95-181, 95th Cong., 1st Sess., at 31-32 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619-620 (1978).

In United States Steel Corporation, 6 FMSHRC 1423, 1437 (June 1984), the Commission concurred in the Zeigler definition of unwarrantable failure and held that an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to the issuance of a citation, because of indifference, willful intent, or a serious lack of reasonable care.

During the course of the hearing in this case, I ruled from the bench that the question as to whether or not the

alleged violation was the result of the respondent's unwarranted failure to comply with the cited mandatory safety standard was not an issue in this civil penalty proceeding, Black Diamond Coal Co., 7 FMSHRC 1117, 1122 (August 1985). However, in a recently issued decision, MSHA v. Quinland Coals, Inc., 9 FMSHRC 1614, September 30, 1987, the Commission held that the merits of any special unwarrantable failure allegation may be addressed in a civil penalty proceeding, and it stated as follows at 9 FMSHRC 1621:

Because under the Mine Act a special finding is a critical consideration in evaluating the nature of the violation alleged and bears upon the appropriate penalty to be assessed, we conclude that the Act does not preclude the review of special findings in a civil penalty proceeding and that the purpose of the Act and the interests of those subject to it are best served by permitting review.

Although the unwarrantable failure issue was not discussed in the initial posthearing briefs filed by the parties, they were afforded an opportunity to further supplement their arguments in light of the Quinland Coals, Inc. decision, and I have considered these arguments in the course of my decision.

On the facts of the instant case, and with respect to the issue of negligence, MSHA takes the position that the respondent exhibited a "high" degree of negligence in that it knew that it was required to submit a new ventilation face print to cover the mining system and conditions which prevailed at the time of the issuance of the citation, and that it further knew that the then available prints did not cover that situation. MSHA's definition of "high negligence," as reflected in its Part 100 civil penalty assessment criteria, 30 C.F.R. § 100.3(d), is as follows: "High Negligence. (The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances)."

In further explanation of the term "mitigating circumstances," section 100.3(d) states "Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards" (emphasis supplied).

Although Mr. Brunatti alluded to changing his negligence finding from "moderate" to "high" when he modified the citation to an order (Tr. 20, 90-91), and the copy of the citation

reflects a faint circle around the appropriate "high" negligence and "order" blocks under items 11 and 12 of the citation form, I find no specific mention of any such modifications on the face of the order (Exhibit G-1). Mr. Brunatti explained that he initially issued the section 104(a) citation, with a moderate negligence finding, because he was led to believe by mine management that another MSHA inspector had previously inspected the section under circumstances similar to those which prevailed at the time of his inspection but issued no violation. Since the previous inspector did not believe that there was a violation, Mr. Brunatti concluded that the respondent also did not know or believe that a violation existed. Mr. Brunatti later changed his mind and modified the citation to an order, and he did so after a telephone conversation with Mr. Onuscheck, during which Mr. Onuscheck led him to believe that there was some miscommunication between his office and mine management, and after a telephone conversation with the inspector who had been on the section previously indicated that this was not so.

Although Mr. Brunatti stated on the face of his order that MSHA inspectors had not been in the cited area prior to his own observations, his testimony, which I find contradictory, is that the prior inspector had been on the section, but only observed pillar mining taking place on the right return side only, and that the left or intake side had not as yet been developed or pillared. Further, the record in this case is devoid of any testimony by Mr. Brunatti that he considered the respondent's actions to be willful, or the result of indifference or a serious lack of reasonable care.

Mr. Brunatti confirmed that his inspection was a "ventilation technical inspection" to insure that any mining taking place was in accordance with the respondent's approved plan. He also confirmed that before embarking on such an inspection, he reviews the mine file which contains all ventilation plans, and that he was "fairly familiar" with the applicable plans for the mine in question. Mr. Brunatti confirmed that face print drawing 11, exhibit R-2, was included as part of the respondent's ventilation plan Review #28, but he could not state whether Part E, which contained the typical face print and variation language, exhibit R-3, was a part of that Review (Tr. 80). Upon subsequent examination of Review 28, which Mr. Brunatti had with him at the hearing, he stated that his copy contained a different Part E, from the one introduced by the respondent, and Mr. Brunatti concluded that it was not a part of Review 28 on file with MSHA (Tr. 81).

MSHA's district engineer Zilka, testified that he last reviewed respondent's ventilation plan Review #28 in August, 1985, a year before the citation was issued, and he could not recall whether Part E was in that file. Although Mr. Zilka did not have the plan in his possession when he testified, he confirmed that the plan in Mr. Brunatti's possession would be the same one on file with his office (Tr. 150). Mr. Zilka could not recall whether or not Part E was in the file that he reviewed, and stated that if it was not in Mr. Brunatti's file it would not be in the official file kept in his office at Pittsburgh (Tr. 151).

In view of the obvious uncertainty as to whether or not Mr. Brunatti and Mr. Zilka were even aware of the existence of Part E, I issued a bench order instructing MSHA's counsel to either take the posthearing deposition of an appropriate MSHA official, or to otherwise confirm whether or not Part E was in fact on file with MSHA's official approved ventilation plan for the mine. By letter dated June 29, 1987, MSHA's counsel confirmed that it was in fact a part of the applicable ventilation plan on file in MSHA's district office.

Based on the foregoing, it seems obvious to me that Inspector Brunatti and Mr. Zilka were not aware of the fact that Part E of the respondent's ventilation plan, which contains some rather ambiguous language with respect to the use of the term "typical systems of face ventilation used in the mine," and seemingly permits some "variations" of the plans. Given this language, Mr. Zilka conceded that it was possible that the respondent may have misconstrued this language (Tr. 180). Mr. Zilka also conceded that some variation is permitted, and he cited as an example a variation concerning "mining a certain block or mining the entries" (Tr. 155). Inspector Brunatti alluded to a variation which would be acceptable with respect to the "erection of the controls right in the working section" (Tr. 90). He also alluded to another "reasonable variation" or "reasonable approximations" from a "typical plan" concerning the positioning a continuous-mining machine (Tr. 343).

Mr. Zilka confirmed that in an effort to reduce the amount of paper work transmitted back and forth between MSHA and the respondent, MSHA requested the respondent to eliminate those ventilation face prints which were not in active use, and to resubmit them when they were to be used (Tr. 136). Mr. Zilka also confirmed that he does not personally approve or reject any mine ventilation plans, and that he simply makes recommendations. He indicated that his recommendations are

reviewed by two additional supervisors before they are submitted to the district manager, who then makes the final decision as to approval or rejection of any particular plan provision (Tr. 153). Mr. Zilka further conceded that with respect to the submission of any ventilation plans, there are often differences of opinions among those people involved in the review process, and he confirmed that he did not discuss face print drawing No. 11, exhibit R-2, which respondent maintains applied in this case, with Mr. Onuscheck prior to the issuance of the violation, and that any such discussion came later (Tr. 184-185). Inspector Brunatti testified that had the respondent submitted a "reasonable approximation" of drawing No. 11, he would have accepted it. Since it was not, he rejected it as being applicable to the conditions which he observed (Tr. 343).

In what I consider to be a rather feeble rebuttal attempt on the part of Mr. Zilka, to support his contention that his prior conversations with respondent's representatives over "many years" should have clearly put the respondent on notice as to what was required to be in compliance at the time the violation was issued, Mr. Zilka explained certain differences in single and double air splits. He conceded that this was not relevant to the facts of this case, and that he only cited it to bolster his contention that the respondent has been informed that it cannot mix plans without submitting a plan addendum (Tr. 359). When Inspector Brunatti was called in rebuttal after Mr. Zilka's testimony, he was asked whether he agreed or disagreed with Mr. Zilka's explanations of single and double splits of air. Mr. Brunatti admitted that while listening to Mr. Zilka's explanation, he was not aware of these distinctions, and was not aware of them at the time he cited the violation. However, Mr. Brunatti then stated that Mr. Zilka was "totally right," and made the comment "that's why he's in Pittsburgh and I'm in the field office" (Tr. 371). Respondent's ventilation engineer Ondecko was called to rebut Mr. Zilka's explanation of what constitutes single and double splits of air, and he expressed total disagreement with Mr. Zilka's analysis (Tr. 371-374).

In a recently decided case, Jim Walters Resources, Inc., 9 FMSHRC 903, 909, the Commission made the following observations with respect to mine ventilation plans:

The Act and the mandatory standard requires the Secretary and the operator to agree upon a ventilation plan. It is of paramount importance under the statute that both the Secretary and the operator proceed diligently and in good

faith to develop a conclusive and suitable plan containing provisions clearly understood by both. * * * It serves neither the safety of the miners nor the policy of the Mine Act when the Secretary and an operator are unable to reach firm agreement on the meaning of a mine plan provision even after several years of dealing with that provision. Given the importance Congress attached to mine specific plans, we emphasize that it is incumbent upon the parties to adopt a more effective mechanism to ensure that mine plans are expeditiously, unambiguously and conclusively approved and adopted. (Emphasis Added).

On the facts of this case, although I have affirmed the violation and have rejected the respondent's implied collateral estoppel defense theory that it could vary its ventilation face prints at its own discretion without prior approval by MSHA, and reject any notion that the absence of any citations by other inspectors during prior inspections absolves the respondent of any liability in this case, I nonetheless conclude and find that MSHA has failed to present any credible or probative evidence to establish that the violation resulted from the respondent's unwarrantable failure to comply with section 75.316.

MSHA's reliance on the testimony of Mr. Zilka, including the asserted MSHA district policy since 1979, and certain policy statements attributed to District Manager Donald Huntley in support of said policy, in support of its conclusion that the respondent has had a long-standing clear understanding of the requirements of section 75.316, are rejected. There is no evidence that MSHA's policy has ever been clearly defined or reduced to writing, or that it was clearly incorporated by reference or otherwise referred to in any of the plans or plan correspondence, and Mr. Huntley was not called by MSHA to testify in this case. As for Mr. Zilka's prior contacts with the respondent, I find them to be rather general, undocumented as to any references to the specific issue concerning the use of the terms "typical face ventilation plans," and any "variations" from those plans. Further, based on my prior findings concerning Mr. Zilka and Mr. Brunatti's testimony regarding their knowledge and understanding of these particular plan provisions, I am convinced that they, as well as the respondent, did not have a clear and unambiguous understanding as to how those particular provisions were to be interpreted and applied in this case, particularly during the period prior to the issuance of the violation, and that this

mitigates the respondent's negligence. Under the circumstances, I find no reasonable or rational basis for concluding that the violation resulted from the respondent's lack of indifference, willful intent, or serious lack of reasonable care. Accordingly, MSHA's assertion that the violation resulted from an unwarrantable failure on the part of the respondent IS REJECTED.

Modification of Order to Citations

In light of my foregoing unwarrantable failure findings, the modified section 104(d)(2) order issued by Inspector cannot stand. It seems clear to me that under section 105(d) of the Act, I have the authority after a hearing to affirm, modify or vacate an order. See also Old Ben Coal Company, 2 FMSHRC 1187 (June 1980); Consolidation Coal Company, 3 FMSHRC 2207 (September 1981); Youngstown Mines Corporation, 3 FMSHRC 1793 (July 1981). Accordingly, the order in question IS HEREBY MODIFIED to a section 104(a) citation.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

Based on the stipulations of the parties, I conclude and find that the respondent is a large mine operator and that payment of the civil penalty assessment for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

On the basis of the stipulations by the parties, and given the size and scope of the respondent's mining operations, I find no basis for concluding that the respondent's compliance record is such as to warrant any additional increase in the civil penalty assessment which I have made for the violation in question.

Negligence

I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence on its part.

Gravity

For the reasons stated in my significant and substantial finding, I conclude and find that the violation in question was serious.

Good Faith Compliance

The parties have stipulated that the violation was abated by the respondent in good faith within the time fixed by the inspector. I adopt this stipulation as my finding and conclusion on this issue.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of \$500 is reasonable and appropriate for the violation which I have affirmed.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of \$500 for a violation of 30 C.F.R. § 75.316, and payment is to be made to MSHA within thirty (30) days of the date of this decision. Upon receipt of payment, this proceeding is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Joseph Yuhas, Joseph T. Kosek, Esqs., Greenwich Collieries, P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 9 1987

RANDY ROTHERMEL/TRACEY PARTNERS, v.	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. PENN 87-121-R
	:	Citation No. 2840770; 2/12/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 87-122-R
	:	Order No. 2840771; 2/12/87
	:	Docket No. PENN 87-124-R
	:	Citation No. 2840772; 2/19/87
	:	Tracey Slope
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. PENN 87-176
	:	A.C. No. 36-01836-03524
TRACEY & PARTNERS, Respondent	:	Docket No. PENN 87-235
	:	A.C. No. 36-01836-03523
	:	Tracey Slope

DECISIONS

Appearances: James P. Diehl, Esq., Williamson, Friedberg & Jones, Pottsville, Pennsylvania, for the Contestant/Respondent;
Susan M. Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern Notices of Contests filed by the operator against MSHA pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of two section 104(a) citations and one section 104(b) order issued to the

operator in February, 1987. The operator is charged with alleged violations of section 103(a) of the Act, because of its refusal to permit an MSHA inspector to conduct spot inspections pursuant to section 103(i) of the Act. A hearing was held in Reading, Pennsylvania, and while the parties were afforded an opportunity to file posthearing briefs, they have not done so. However, I have considered the oral arguments made by counsel on the record during the hearing in these proceedings.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 103(a) and (i) of the Act, 30 U.S.C. § 813(a) and (i); and section 110(i), 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented in this matter include the following:

1. Whether the operator violated section 103(a) of the Act by denying entry to the inspector for the purpose of conducting a section 103(i) spot inspection, and if so, the appropriate civil penalties to be imposed for the violations.
2. Whether the facts and evidence adduced in this matter support MSHA's contention that the operator has not been subjected to any illegal or discriminatory inspections pursuant to section 103(i) of the Act.
3. Whether the facts and evidence adduced in this matter support the operator's contention that no valid or legal basis exists at this time for MSHA's continuing its mine on an indefinite section 103(i) spot 5-day inspection cycle.
4. Whether the statutory language found in section 103(i) of the Act with respect to an occurrence of a methane ignition or explosion "during the previous five years," automatically

terminates MSHA's authority to keep the mine on a 5-day spot inspection status at the expiration of 5 years, during which time no further methane ignitions or explosions within the meaning of section 103(i) have occurred.

5. Whether the aforesaid statutory language authorizes or requires MSHA to continue its 5-day spot inspections of the mine ad infinitum subsequent to the expiration of 5 years from the date of the methane ignition and explosion which initially placed the mine in that status.

6. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Stipulations

The parties stipulated to the following (Joint Exhibit-2; Tr. 7):

1. Randy Rothermel is the Managing Partner of Tracey Slope.

2. The mine is subject to the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction over the proceedings pursuant to section 105 of the Act.

4. The citations, orders, and modifications, involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the operator at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance.

5. The parties stipulate to the authenticity of their exhibits but not to the relevance or the truth of the matters asserted therein.

6. The operator had a multiple nonfatal methane explosion accident at its Tracey Slope Mine on February 10, 1982, which resulted in serious injuries to three miners.

7. Following this incident, the operator was put on a 5-day spot inspection series under section 103(i) of the Act by MSHA. The basis for this action was that a "methane ignition or explosion had occurred which resulted in serious injury."

8. This mine has been subject to 5-day spot inspections at irregular intervals since that time.

9. There has been no methane ignitions or explosions at this mine resulting in serious injury since the accident on February 10, 1982. The mine has not liberated "excessive quantities of methane" as that term is defined in section 103(i).

10. On February 12, 1987, MSHA Inspector Victor G. Mickatavage of the Shamokin Field Office arrived at the mine to conduct a section 103(i) spot inspection. Mr. Randy Rothermel, an owner of the mine, stated that he was denying entry to the mine to conduct a section 103(i) spot inspection. Mr. Rothermel stated, however, that he would permit any inspection other than an inspection pursuant to section 103(i).

11. At 11:45 a.m., the MSHA inspector issued Citation No. 2840770 under section 103(a) of the Act for the denial of entry, allowing 45 minutes to abate.

12. At 12:30 p.m., the MSHA inspector issued a section 104(b) withdrawal order, Order No. 2840771, under section 103(a) of the Act for failure to abate Citation No. 2840770, which order did not prohibit entry into the mine.

13. On February 13, 1987, the MSHA inspector returned to the mine and issued a Modification to Citation No. 2840770 and Order No. 2840771, and entry to perform a section 103(i) inspection was again denied.

14. On February 19, 1987, the MSHA inspector was again denied entry to the mine to conduct a section 103(i) spot inspection. The MSHA inspector issued Citation No. 28040772 for failure to comply with the section 104(b) Withdrawal Order No. 2840771 as modified Order 2840771-01.

15. A letter dated September 15, 1986, Exhibit "C-1," is a true and correct copy of a letter sent by Randy Rothermel to the then acting District Manager, Joseph Garcia, the District Manager of Coal Mine Safety and Health, District No. 1.

16. During the 24-months preceding the date of the contested citations and order, the operator received a total of 24 citations and was subject to a total of 142 inspection days.

17. The operator is a small underground anthracite mine operator, employing three to five people underground, and two people on the surface, and has an annual coal production of approximately 4,000 tons (Tr. 33, 170).

Discussion

The citations and order issued in these proceedings, all of which allege violations of section 103(a) of the Act, are as follows:

Section 104(a) non-"S&S" Citation No. 2840770,
February 12, 1987 (Docket Nos. PENN 87-121-R, and
PENN 87-235).

On 2-12-87, Randy Rothermel, partner and mine foreman, refused to allow Victor G. Mickatavage, an authorized representative of the Secretary, entry into the Tracey Slope Mine for the purpose of conducting an inspection of the mine pursuant to section 103(a) of the Act. Mr. Rothermel stated that the inspector (Federal) could not enter the mine to conduct the 103(i) inspection.

Section 104(b) "S&S" Order No. 2840771, February 12, 1987
(Docket No. PENN 87-122-R):

Randy Rothermel, partner and mine foreman, continued to deny Victor Mickatavage, authorized representative of the Secretary, the right of entry into the Tracey Slope mine for the purpose of conducting an inspection of the mine in accordance with the requirements of section 103(a) of the Act on 2-12-87 after the expiration of a reasonable time allowed for Mr. Rothermel to comply.

Section 104(a) "S&S" Citation No. 2840772, February 19, 1987 (Docket Nos. PENN 87-124-R, and PENN 87-176).

The operator failed to comply with 104(b) order of withdrawal No. 2840771 dated 2-12-87 and modified 2-17-87, issued for failure to abate a 104(a) Citation No. 2840770 dated 2-12-87, issued to section 103(a) of the Act. One gunboat of coal was observed being hoisted from underground.

The essential facts in these proceedings are not in dispute. On February 10, 1982, at approximately 8:10 p.m., a methane gas explosion occurred at the mine, and three laborers working in the mine received burn injuries. As a result of this incident, which occurred over 5-years ago, the mine operator has been subjected to spot inspections by MSHA once during every 5 working days at regular intervals in accordance with section 103(i).

On February 12, 1987, the mine operator, believing that MSHA's rights of inspection pursuant to section 103(i) had expired and lapsed, denied entry to MSHA Inspector Victor Mickatavage for purposes of conducting a section 103(i) inspection. At the time of the denial of entry, the operator advised the inspector that he would permit any form of inspection other than an inspection pursuant to section 103(i) of the Act. As a result of the operator's failure to allow the inspector entry to conduct a section 103(i) inspection, the inspector issued the citations and order in question.

During opening statements at the hearing, MSHA's counsel stated that the citations and order resulted from the operator's denial of entry to its mine by MSHA inspectors on different occasions. The inspectors sought entry for the purpose of conducting section 103(i) inspections, and they did so in the exercise of their right of inspection pursuant to section 103(a) of the Act. Recognizing the fact that MSHA's right of

inspection may not be exercised illegally or in a discriminatory manner, counsel asserted that MSHA has an absolute right of warrantless entry, and that the inspectors were attempting to exercise that right pursuant to section 103(i). MSHA's view of the issue presented in these proceedings is whether or not the operator was being subjected to illegal or discriminatory inspections pursuant to section 103(i) of the Act as alleged by the operator.

MSHA's counsel pointed out that the operator contends that the attempted section 103(i) spot inspections were illegal because 5 years have passed since the operator was initially put on notice that its mine was on a section 103(i) spot inspection cycle because of a methane explosion which resulted in serious injuries. Contrary to the operator's contention, MSHA takes the position that there is no automatic termination of section 103(i) spot inspections after the passage of 5 years from the event which initially placed the mine in that inspection posture. MSHA's position is that it has discretion, based on the particular conditions present in a mine, to determine whether or not the mine should exit or remain subject to continued section 103(i) 5-day spot inspections. MSHA asserted that its evidence establishes that the decision to maintain the mine on the spot inspection cycle was based on MSHA's continued fear of the presence of methane gas in the mine. Under the circumstances, MSHA concludes that it has acted well within its statutory authority to continue the section 103(i) spot inspections to the present time (Tr. 8-9).

The operator's counsel stated that section 103(i) sets forth certain criteria for the conduct of spot inspections every 5 days, namely; (1) liberation of excessive quantities of methane gas as that term is defined by the Act, (2) a methane ignition or explosion resulting in death or serious injury within the previous 5 years, or (3) the existence of other hazardous mine conditions. Counsel contended that in the case at hand, the only mining activity tested during any of the section 103(i) inspections was a test for methane, and on one occasion, ventilation testing. Counsel asserted that the sole purpose advanced by MSHA to the operator for its desire to conduct the inspections was the opinion by MSHA's district office that it could continue its inspections without any of the necessary criteria found in section 103(i) of the Act.

Counsel pointed out that it is uncontroverted that the operator has allowed MSHA entry to its mine for the purpose of conducting any other type of inspections, including regular spot inspections, and has only resisted MSHA's attempts to

continue with section 103(i) spot inspections every 5 days. Counsel contended that the mine has been subjected to 142 inspection days in a period of less than 24 months, and that taking into account the number of days the mine has been closed, MSHA's inspections have amounted to a substantial interference with the operator's mining activity (Tr. 9-11).

Counsel stated that by letter dated September 15, 1986, (Exhibit C-1), the operator wrote a letter to MSHA's Acting District Manager, Joseph Garcia, Wilkes-Barre, Pennsylvania, advising him of all of the facts incident to the prior methane ignition which triggered the 5-day spot inspection cycle, and requesting a ruling as to whether or not the mine could be removed from its spot inspection status, but that the letter remains unanswered. Counsel suggested that since MSHA did not respond to the operator's letter, it believed that the only way it could resolve the question was to create a circumstance under which a violation would be issued, thereby providing a forum in which to decide the propriety of the section 103(i) spot inspections (Tr. 11).

Conceding that the operator's letter was not answered, MSHA's counsel asserted that while no formal response was forthcoming, numerous meetings have been held between MSHA personnel and the operator to discuss the matter, and that these discussions would constitute a verbal response to the operator's letter (Tr. 11). MSHA's Shamokin Area Field Office Supervisor James Schoffstall confirmed that Acting District Manager Garcia has since returned to his regular duty station in the Pittsburgh area, and that the operator's letter may have been mislaid or misrouted. Mr. Schoffstall confirmed that he has not seen the letter, and the operator's counsel confirmed that there was some dialogue between Mr. Randy Rothermel, the operator, Mr. Schoffstall, and the inspector, but that no responsive written reply has ever been received by Mr. Rothermel with regard to his letter (Tr. 14-15). Mr. Schoffstall also confirmed that he has consulted with his supervisor in the district office, Edward Connor, Acting District Manager, who in turn consulted with MSHA's headquarters in Arlington, Virginia, and that Arlington's answer "was that this five years is a minimum, and there is no time limit" (Tr. 16).

MSHA's counsel confirmed that MSHA still has under consideration the seeking of a court injunction to allow it to gain entry to the mine for the purpose of continuing its section 103(i) spot mine inspections every 5 days, but that it has not done so as of the time of the hearing. Counsel pointed out that the violations in issue in these proceedings were abated

after a period of time when the operator permitted entry to the inspectors for the purpose of conducting section 103(i) spot inspections, and that MSHA abandoned any recourse to injunctive action. However, the operator has again started to turn away its inspectors, and injunctive relief is again being considered by MSHA. The operator's counsel confirmed that this was true, but stated that the operator is no longer permitting entry to the inspectors because of the instant litigation, and MSHA's counsel confirmed that another series of citations are likely to be issued because of the operator's renewed and continued refusal to permit section 103(i) spot inspections (Tr. 12-14).

MSHA's counsel confirmed that the operator at the present time is not only refusing entry for spot inspections, but is also refusing any type of entry to MSHA inspectors, even for regular inspections. The operator's counsel asserted that "we are not working the mine" (Tr. 17).

MSHA's Testimony and Evidence

James E. Schoffstall, Supervisor, MSHA District No. 1 Shamokin Field Office, confirmed that he has been in that position since November, 1980, and that his duties include the supervision of a staff of 13 MSHA inspectors. He testified as to his background and experience, including the management of two mines as a superintendent, and he confirmed that he holds mine foreman papers issued by the State of Pennsylvania (Tr. 19-22).

Mr. Schoffstall confirmed that the mine in question has been within his enforcement jurisdiction since February, 1985, when it was taken over from MSHA's Pottsville or Schuylkill-Haven office. He confirmed that he has been in the mine numerous times, and that he was familiar with the citations and orders issued by MSHA Inspector Victor Mickatavage (joint exhibit-1). Mr. Schoffstall confirmed that he discussed the circumstances surrounding the issuance of the violations with Inspector Mickatavage, who works under his supervision, and that Mr. Mickatavage issued the violations because he was denied entry to the mine for the purpose of conducting section 103(i) inspections, and was hindered in his attempts to conduct the inspections (Tr. 22-24).

Mr. Schoffstall confirmed that the mine is also subject to annual and quarterly inspections, including follow-up inspections in connection with the issuance of any citations or orders. He also confirmed that the mine became subject to the section 103(i) spot inspections after a multiple nonfatal

methane explosion accident which occurred at the mine on February 10, 1982, and he identified exhibit G-1 as the official MSHA accident investigation report of that incident which he obtained from MSHA's District No. 1 office in Wilkes-Barre (Tr. 25).

Mr. Schoffstall was of the opinion that section 103(i) was enacted "for the sole reason of troubled mines. Mainly, Number 1, was excessive amount of gases; Number 2, if a mine experienced an explosion; and then also you have another category for special hazards" (Tr. 34). He also believed that section 103(i) mandates that inspections "be made under periodic time limit," namely once every 5-working days at irregular intervals in this case, "to see that they are complying with the law, and to see that the conditions are being controlled" (Tr. 36).

With regard to the language of section 103(i) concerning methane or other gas explosions which have resulted in death or serious injury during the previous 5 years, Mr. Schoffstall was of the view that this stated time frame is a minimum, amount of time that the mine must be placed on the section 103(i) spot inspection cycle, and that it is not a maximum time limitation. Mr. Schoffstall was of the further view that MSHA could continue its section 103(i) spot inspections if it "feels that the mine is on the borderline or it is subject to a condition happening again in that mine" (Tr. 36).

Mr. Schoffstall confirmed that since the 1982 ignition, the mine experienced another methane ignition in 1985 in the Number 4 Level West Gangway Section where some methane was ignited as a cut of coal was fired from the base. That ignition did not result in any injuries or death, and the incident was investigated by MSHA's Pottsville office (Tr. 40). He identified exhibit G-2 as a copy of the official MSHA investigation report of that incident (Tr. 43).

Mr. Schoffstall confirmed that he considered Mr. Rothermel's verbal requests made to Inspector Mickatavage 2 or 3-weeks prior to the denial of entry to be removed from the section 103(i) spot inspection series because the 5-year period has expired. Mr. Schoffstall stated that after discussing the request with his superiors, "we feel that the mine still should be considered within the 103(i) category." Mr. Schoffstall stated that the reasons for this included "the condition that the mine is in with the unlimited amount of ventilation, and the irregularity of the ventilation--and also, the immediate area where they are now working has a condition of roof control along with a new area that they intend

to development which is to the east which allows an additional taxation on the ventilation system" (Tr. 50-51).

Mr. Schoffstall confirmed that the decision to deny Mr. Rothermel's request to be removed from the section 103(i) spot inspection cycle was a "joint decision" made by himself, Acting District Manager Edward C. Connor, and Inspector Mickatavage, and that the decision was communicated verbally to Mr. Rothermel who was "basically" informed of the reasons for the decision (Tr. 51-53). MSHA's counsel confirmed that the decision in question was not formalized in writing, and Mr. Schoffstall confirmed that his office has never informed an operator in writing that he would be removed from any section 103(i) inspection cycle because MSHA has never been challenged in this regard (Tr. 51-54).

Mr. Schoffstall stated that three other mines in his district are presently on a section 103(i) spot inspection cycle, for reasons other than a methane ignition, and that two mines are on that cycle because of impounding water (Tr. 55). In the instant case, Mr. Schoffstall could think of no reason why the operator has not been advised in writing as to the specific reasons why MSHA is keeping him on the section 103(i) spot inspection cycle (Tr. 56), and that "we've never done it any other way in the district except verbally" (Tr. 57).

Mr. Schoffstall stated that immediately after the denial of entry in this case, a meeting was held in MSHA's office with the operator's counsel Diehl present, and the matter was discussed. At that time, Mr. Rothermel was advised of MSHA's decision to keep the mine on a section 103(i) cycle (Tr. 61). Mr. Schoffstall could not confirm whether Inspector Mickatavage informed Mr. Rothermel of these reasons during their discussions prior to the refusal of entry (Tr. 61).

Mr. Schoffstall testified to the specific reasons previously alluded to as to why the decision was made to keep the mine on the section 103(i) cycle. Referring to a mine map (exhibit G-7), he alluded to certain air measurements made during past inspections, some purported roof problems necessitating retimbering, and an unplanned roof fall within the past 4 months in an escape route. He believed that any roof fall in either the main intake or return presented the possibility of blocking the entrance and possibly restricting ventilation. However, he confirmed that the unplanned roof fall was addressed by developing a new area to go around it, and that no injuries resulted from that fall (Tr. 61-65).

Mr. Schoffstall further alluded to air measurements taken along the haulage slope indicating 8 to 10 thousand cubic feet of air in the main intake and return resulting from air short-circuiting through some old stoppings, and other areas of possible air leakage through an area which is planned for development in an easterly direction. He also alluded to citations which were issued for air leakage through some temporary stoppings, and indicated that the air at that location was "just a minimal amount" to meet the requirements of the law (Tr. 66).

Mr. Schoffstall discussed the operator's intentions to install overcasts at the gangway level as it developed to the east, and he indicated that this may place an additional burden on the ventilation system caused by air leakage which may be created by crosscuts and openings which need to be stopped off (Tr. 67). In response to questions concerning the operator's intentions to mine to the east, Mr. Schoffstall confirmed that the operator is required to file ventilation plan changes as it develops or anticipates to develop new mine areas, and he confirmed that a new ventilation plan has been filed. He also confirmed that in this case, MSHA has approved the operator's ventilation plan to meet the minimum standard of 3,000 cubic feet of air at the face, and 5,000 at the last open crosscut (Tr. 68). However, he indicated that MSHA is not certain whether the existing ventilation system is enough to cover the area being developed to the east, and that this is part of the reasons why it wants to keep the mine on a section 103(i) inspection cycle (Tr. 68).

Mr. Schoffstall confirmed that MSHA wishes to keep the operator on the section 103(i) inspection cycle in the newly developed area because of its "pending development." He conceded, however, that MSHA will still have to review the adequacy of the ventilation in 3 or 6 months intervals, and he conceded that such an evaluation of the ventilation could be done independently of any section 103(i) inspection. He further conceded that if the mine had not experienced a prior methane ignition, any perceived ventilation problem would not necessarily be reason enough to place the mine on a section 103(i) inspection cycle (Tr. 69). He confirmed that the mine is located in a gassy vein, and that coupled with the asserted bad roof, these conditions are inherent to the mine (Tr. 70).

Mr. Schoffstall confirmed that while he believed that the mine has a "borderline" ventilation system, MSHA nonetheless has approved the ventilation plan, and keeping the mine on a section 103(i) inspection status will facilitate MSHA's monitoring of the ventilation (Tr. 73).

In further explanation of the decision to keep the mine on a section 103(i) inspection cycle, Mr. Schoffstall stated as follows (Tr. 75-76):

A. Okay. The basis was, Number 1, was the ventilation system, the irregularities of the ventilation system; the problems that they were having with the roof control, holding the return entries open; and the constant pressure on the main intake; 3, was the ventilation system to the east, will it be effective enough to be able to liberate the methane that they're going to encounter; and Number 4 is, that they're going towards an uncharted area that's filled with water, which we will require a bore hole plan.

JUDGE KOUTRAS: A bore hole plan?

THE WITNESS: Yes. In other words, when they get within two hundred feet of the uncharted workings that we have no mapping on, then they must start drilling in advance to locate this water.

BY MS. JORDAN:

Q. If it --

JUDGE KOUTRAS: But, that would be required, independent of any 103(i)?

THE WITNESS: That's right. That will go under special inspection.

* * * * *

A. All right. What it is is the inconsistency of the ventilation puts a borderline on the amount of ventilation available at the working faces to sweep away the noxious gasses. Number 2, is the possible blockage, due to an unplanned roof fall in the returns could cause a restriction of ventilation, that would also cause a buildup of methane at the faces. And, then the area in which they're going to tax additional efforts out of the ventilation system to the east, all in conjunction with it

puts the mine at an area where we feel it's borderline as to the abilities of keeping the faces clean of methane.

Mr. Schoffstall identified and reviewed copies of citations issued to the operator for violations of the roof control requirements of mandatory safety standard section 75.200, the ventilation air requirements of section 75.301, and the ventilation plan requirements of section 75.316 (exhibits G-3 through G-5, Tr. 87-94; 98-102; 117-118; 119-122).

Mr. Schoffstall confirmed that he did not issue any of the citations, and that he was not present when they were issued (Tr. 122-123). He also confirmed that he retrieved the copies from MSHA's files in response to the operator's prehearing interrogatories, and while he may have previously reviewed the citations after they were issued as part of his supervisory duties, he would only have reviewed those issued by Inspectors Donn Lorenz and Victor Mickatavage, from his Shamokin office, but not those issued by inspectors from MSHA's Pottsville, office (Tr. 124-125). He confirmed that the citations in question have all been abated (Tr. 155).

Mr. Schoffstall further confirmed that when he assembled the copies of the prior citations, he did not include copies of any extensions which may have been issued, nor did he include copies of any abatement or termination notices unless the abatement was shown on the face of the citation itself (Tr. 144). MSHA's counsel stated that any terminations and extensions relevant to the citations were included with her responses to the operator's discovery requests, and that they are a matter of record (Tr. 146-147).

On cross-examination, Mr. Schoffstall reiterated that he did not conduct any of the prior inspections or issue any of the citations previously referred to. With regard to any methane tests conducted in the mine, Mr. Schoffstall confirmed that he has never personally conducted any such tests, but has accompanied an inspector when he did it. With regard to his prior testimony speculating to a 50 percent loss of air in the ventilation circuit, Mr. Schoffstall conceded that he performed no test to support any such statement (Tr. 154-155).

Mr. Schoffstall confirmed that he was present at a conference with counsel Diehl during which he stated to counsel that the sole basis for the section 103(i) inspections was the prior methane ignition which resulted in injury to two men. When asked whether that was still his position, Mr. Schoffstall

responded "Because of the explosion, because of the conditions of the explosion, yes" (Tr. 154-155). With regard to the 1985 ignition incident, Mr. Schoffstall confirmed that it was reported to MSHA by the operator (Tr. 158).

Contestant's Testimony and Evidence

Randy Rothermel, the operator of the mine, confirmed that MSHA Inspector Victor Mickatavage was at the mine on February 12, 1987, and requested entry for the purpose of conducting a section 103(i) inspection. Mr. Rothermel acknowledge that he informed the inspector that he could conduct any other kind of an inspection except for a section 103(i) inspection. As a result of his refusal to permit the inspector to conduct a section 103(i) inspection, the inspector issued him a citation, but did not prohibit him from proceeding with his mining activities (Tr. 160-161). At the expiration of a half an hour, the inspector then served him with an order, and that too did not prohibit him from continuing with his mining activities. He received another order some 5 days later (Tr. 162). Mr. Rothermel confirmed that he had written a letter to MSHA's Acting District Manager Garcia approximately 4 to 6 months earlier, but has received no response from Mr. Garcia or anyone else (Tr. 163).

On cross-examination, Mr. Rothermel acknowledged that he has often discussed with MSHA inspectors, including Mr. Mickatavage, the matter concerning section 103(i) inspections, and that they never advised him that he could not at the present time be removed from the section 103(i) spot inspection cycle. When asked what the inspectors may have told him, Mr. Rothermel responded "They said, if you think that's the law, you have to fight it. So that's what we're doing here today" (Tr. 164).

In response to further questions, Mr. Rothermel stated that he was prompted to write his letter after first receiving a copy of the Act, and that prior to that time "I didn't know what a 103(i) was." In addition, he stated that he spoke with Mr. Garcia by telephone before writing the letter, and that Mr. Garcia told him to write to him. His refusal to permit the inspector to conduct a section 103(i) inspection was based on the fact that he received no response to his letter (Tr. 165-166).

Mr. Rothermel stated that another mine operator who operates a mine adjacent to and behind his (Wolfgang Brothers), was in a section 103(i) inspection status for 7 years for experiencing the same type of ignition as that which occurred

in his mine, but was taken off by MSHA. Since that operator was taken off, Mr. Rothermel acknowledged that his curiosity was aroused as to why his mine was still in a section 103(i) status (Tr. 167). Mr. Rothermel indicated that the adjacent mine operator was taken off after he wrote his letter to Mr. Garcia (Tr. 168). After consulting with Mr. Schoffstall at counsel table, MSHA's counsel confirmed that the mine operator referred to by Mr. Rothermel was in fact in a section 103(i) status, but was removed after 7 years (Tr. 167).

Mr. Rothermel stated that his mine has operated on an average 4-day weekly basis for the past 5 years, and that he spends approximately 4 hours a week with a Federal inspector during a section 103(i) inspection. He also stated that his mine has been subjected to four AAA regular MSHA inspections, and that the time spent on those inspections ranged "from four days straight, to some mix with the AAA or the 103(i)" (Tr. 169). He estimated that during each work week, he has had one and a half-days of inspections (Tr. 169).

Mr. Rothermel stated that the section 103(i) inspections have interfered with his operation of the mine, and he explained as follows at (Tr. 170-171):

THE WITNESS: With only three to five guys there, one guy is with an inspector, well, there's only two working, and I'm usually the guy, and I'm the foreman to start with. It usually consists of going out of the mine, talking to an inspector, seeing what he wants to see, or whatever, then we go down. The inspection actually lasts maybe a half an hour.

* * * * *

THE WITNESS: It's not only the inspections themselves, there's so much other business to go with it. Roof control plans, ventilation plans, all kinds of other stuff, it's really getting to be time consuming.

JUDGE KOUTRAS: Are you also regulated by the state?

THE WITNESS: Yes.

JUDGE KOUTRAS: Are you on any kind of a spot inspection --

THE WITNESS: No.

JUDGE KOUTRAS: -- cycle with the state?

THE WITNESS: One inspection day every two months.

JUDGE KOUTRAS: One inspection day every two months.

THE WITNESS: Yes.

Mr. Rothermel confirmed that although the mine works 4 days a week, people may be at the site on the other 3 days running pumps, cutting timber, or doing repair work. In 1984, at the time some of the citations were extended, the mine worked 2 days a month, and an inspector was there on each day. During regular inspections when an inspector is there for four straight days, he usually spends 3 days underground and 1 day doing surface inspections or reviewing mine records. On some AAA inspections, an inspector may be at the mine for 6 days in a row, or less, in order to complete the inspection (Tr. 172-176).

Mr. Schoffstall was recalled by the Court to explain the circumstances under which the other mine operator referred to by Mr. Rothermel was taken off the section 103(i) cycle, and he testified as follows (Tr. 177-178):

THE WITNESS: All right. The operator had a ventilation and gas liberating mine which was put on, initially, because of an explosion. The operator requested that he be taken off, you know, which is the same thing Mr. Rothermel had done. We reviewed it. We reviewed the circumstances, and we recommended he be taken off because the conditions in the mine had changed. He had adequate air. He didn't have the methane liberations any more at the face areas. So, we felt it secure. We were very comfortable in taking him off the 103(i).

JUDGE KOUTRAS: What distinguishes that case from this one in your mind?

THE WITNESS: Well, actually, two things. The liberation content. They dropped their liberation content. They went into another section of the mine and lost their methane. They

didn't have near the amount of methane being liberated out of that mine as to what they did prior. Number two was, they had established a better airway system and a better ventilation system. In other words they were on a retreat, a mining process which didn't involve as much face ventilation as what they had prior. And we seen no reason, the roof was good, their ventilation was good, and we seen no reason to keep them on.

JUDGE KOUTRAS: Do you know what the frequency of their citations has been since they were taken off?

THE WITNESS: I would say a normal small mine, not that many. I couldn't count as number-wise, but I would say very few.

JUDGE KOUTRAS: How do they compare in size to this operator, do you have any idea?

THE WITNESS: About the same size.

JUDGE KOUTRAS: About the same size.

THE WITNESS: This mine here is developed a little bigger. It's more to maintain than what they have. They're not down as deep or extended as far. But, size-wise, manpower about the same.

Findings and Conclusions

Section 103(i) of the Act provides as follows:

Whenever the Secretary finds that a coal or other mine liberates excessive quantities of methane or other explosive gases during its operation, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine some other especially hazardous condition, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine during every five working days at irregular intervals. For purposes of this

subsection, "liberation of excessive quantities of methane or other explosive gases" shall mean liberation of more than one million cubic feet of methane or other explosive gases during a 24-hour period. When the Secretary finds that a coal or other mine liberates more than five hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 10 working days at irregular intervals. When the Secretary finds that a coal or other mine liberates more than two-hundred thousand cubic feet of methane or other explosive gases during a 24-hour period, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine every 15 working days at irregular intervals.

Although section 103(a) of the Act gives MSHA a right of entry to the mine for inspection purposes, it seems clear to me that MSHA's authority to conduct spot inspections every 5 days pursuant to section 103(i) is subject to the following limitations:

--- a mine which liberates excessive quantities of methane or other explosive gases during its operations, namely, more than one million cubic feet of methane or other explosive gases during a 24-hour period.

--- a mine which has experienced a methane or other gas ignition or explosion resulting in death or serious injury at any time during the previous five years.

--- a mine where there exists some other especially hazardous condition.

Section 103(a) of the Act requires the Secretary to "develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws." The only relevant guidelines that I can find with respect to the interpretation and application of the spot inspection requirements of section 103(i) of the Act, are those found in Volume 1, page 17, of

the Secretary's Coal Mine Inspection Manual, effective November 1, 1982, which states as follows:

Spot inspections made relative to Section 103(i) should be made with respect to the hazard(s) that caused the mine to be placed in this category. For example, if the mine is being inspected because there exists some "other especially hazardous conditions(s)," such as serious problems with the haulage system, then the inspection activities should be directed toward the haulage system.

The operator wrote a detailed letter to MSHA's Acting District Manager Joseph Garcia, Wilkes-Barre, Pennsylvania, on September 15, 1986, some 6 months before its refusal of entry, requesting MSHA to consider removing the mine from the section 103(i) spot inspection cycle. In support of its request, the operator asserted that during the past 4 years its ventilation system had greatly improved, greater quantities of air were being generated at working faces, and that recent testing by MSHA inspectors indicated that at the maximum there was 87,000 cubic feet of methane liberated in a 24-hour period at the mine. The letter was not answered.

MSHA's Shamokin Field Office Supervisor Schoffstall testified that he did not see the letter and speculated that it was either mislaid or lost. I would venture a guess that Mr. Schoffstall did not see the letter because he was in Shamokin and Mr. Garcia was in Wilkes-Barre. Mr. Schoffstall confirmed that he "basically" verbally informed Mr. Rothermel of his decision not to remove the mine from the 5-day inspection cycle, and that his office has never informed a mine operator in writing of such decisions because MSHA has never been challenged in this regard in the past. Mr. Schoffstall also confirmed that he consulted with his supervisor, who in turn consulted with MSHA's headquarters, and apparently received a brief oral opinion by telephone. While I find this advisory

taken off that status after writing to MSHA requesting that this be done. Mr. Schoffstall confirmed that this was true, and he explained that MSHA terminated the spot inspection status of that mine after reviewing the circumstances and finding that the mine conditions had changed. The changed conditions included a reduction in the amount of methane liberated at the face areas and the establishment of a better airway and ventilation system. Mr. Schoffstall was of the opinion that these two factors distinguishes Mr. Rothermel's mine from his neighbor's mine.

I take note of the fact that MSHA's report of investigation concerning the February 10, 1982, methane ignition concluded that the accident occurred because of the operator's failure to follow proper blasting procedures, which contributed to the ignition source, and that it failed to follow proper ventilation practices which permitted an explosive mixture of methane to accumulate in the accident area. Other contributing factors noted by MSHA included the failure to install adequate ventilation controls, such as an overcast, regulators, and stoppings, to direct the intake air current, and the failure to properly check for methane before blasting (Exhibit G-1, page 6).

Assuming the correctness of MSHA's position that the passage of 5 years without an ignition or explosion resulting in death or serious injury does not automatically terminate its discretionary right to continue to inspect the mine every 5 days, MSHA nonetheless recognizes the fact that its continued inspections must be based on the particular conditions present in the mine. In this case, MSHA has taken the position that it must continue to exercise its perceived discretion to continue to conduct spot inspections every 5 days because of its continued fear of the presence of methane gas in the mine.

The record in this case reflects that during MSHA's investigation of the ignition which occurred in 1982, the operator was cited for a violation of section 75.309(b), after 5.0 percent methane was detected in a return split of air, and was also cited for having an inoperative methane detector. However, there is no evidence that the operator has ever been cited for violations of any of the mandatory safety standards dealing with weekly examinations for hazardous conditions (75.305); weekly ventilation examinations (75.306); methane examinations (75.307); methane accumulations in face areas (75.308); and methane monitors (75.313).

In the course of opening arguments, the operator's counsel asserted that subsequent to the February 10, 1982, incident which placed the mine on a 5 day section 103(i) spot inspection cycle, the only mining activity tested during any of the subsequent 103(i) inspections was one test for methane, and one occasion when the ventilation was tested.

MSHA has stipulated that no methane ignitions or explosions resulting in serious injury have occurred in the mine since the accident of February 10, 1982, and that the mine has not liberated "excessive quantities of methane" as that term is defined by section 103(i). Further, in response to the operator's discovery requests with respect to any tests performed showing the presence of excessive quantities of methane or other explosive gases in the mine, MSHA responded as follows at page 2 of its May 7, 1987, responses:

--- There is no record of methane liberations of more than 1,000,000 cubic feet in 24 hours.

--- There is no record of methane liberations of more than 500,000 cubic feet in 24 hours.

With respect to the answer to an identical question concerning the presence of methane liberation of more than 200,000 cubic feet in 24 hours, MSHA made reference to an analysis of air samples collected on February 11, 1982, as part of its investigation of the methane ignition which occurred on February 10, 1982. That report reflects a methane liberation level of 237,000 cubic feet in 24 hours on that day, and 4.98 percent methane. Copies of the results of additional bottle samples apparently collected by MSHA during its investigation during February 11 through 19, 1982, reflect methane levels of 0.13, 0.04, 1.34, 0.35, 0.46, 0.15, 0.34, 0.38, 0.20, 0.37, 0.33, 0.18, and 0.41 at the places tested.

The only evidence of any face ignitions which have occurred at the mine subsequent to February 10, 1982, is an incident which occurred on July 23, 1985, and the details are discussed in an MSHA Memorandum of July 26, 1985 (exhibit G-2). The facts show that the ignition which was reported by the operator, did not result in any death or serious injury, and MSHA concedes that this ignition incident is not within the statutory definition of "ignition or explosion" found in section 103(i), and that such an occurrence, standing alone, would not trigger a section 103(i) spot inspection cycle. MSHA's memorandum report of this incident reflects that a citation was issued pursuant to section 75.301 for inadequate face ventilation, and the record reflects that the operator took

immediate action to abate the violation. The memorandum also reflects the presence of .6 percent methane at the face, and that all ventilation controls were in compliance with MSHA's regulations. The test results taken to support the citation reflected .23 percent methane in the immediate return off the face, and .10 percent methane in the main return. It also reflects 17,000 cubic feet of methane liberation in 24 hours at the first noted return location, and 43,000 feet at the second.

Mr. Schoffstall confirmed that the mine does liberate methane. However, this is true of practically all underground coal mines. MSHA has concluded that the mine has an ongoing problem with methane liberation in the mine, yet the only witness it presented was Mr. Schoffstall. Except for two air measurements taken in October, 1986, and one air sample taken in March, 1987, there is no credible evidence in this case that MSHA has ever conducted a detailed methane or ventilation system survey at the mine to support its generalized and speculative conclusions that methane liberation is in fact a hazardous problem in the mine. Mr. Schoffstall admitted that MSHA has not monitored the mine to find out how much methane has been liberated in the mine (Tr. 140).

In view of the foregoing, and for the reasons discussed in my findings and conclusions which follow, I conclude and find that MSHA has failed to present any credible probative evidence to support a conclusion that the mine has any ongoing hazardous methane problems warranting mine inspections every 5 days pursuant to section 103(i) of the Act.

Although MSHA's counsel confirmed that MSHA's reason for keeping the mine on a 5 day section 103(i) inspection cycle is out of concern for the presence of methane in the mine, counsel indicated that the general mine problems as evidenced by the abated violations which have been introduced in this case, generally constitute "other especially hazardous conditions" which impact on the presence of methane in the mine (Tr. 95). A discussion of these alleged hazardous conditions follows.

The record in this case establishes that from February 10, 1982, the date the mine was placed on a section 103(i) 5-day inspection status, until February, 1985, a period of 3 years, the mine was under the enforcement jurisdiction of MSHA's Pottsville or Schuylkill-Haven Field Office, and that for the past 2 years, it has been under the jurisdiction of Mr. Schoffstall's Shamokin Field Office.

MSHA presented no testimony concerning the prevailing mine conditions during the 3-year period that the mine was inspected before Mr. Schoffstall's office assumed jurisdiction of the mine. The only "evidence" produced by MSHA covering that period of time was a copy of a section 104(a) citation issued on June 6, 1984, for a roof control violation, and a citation issued on June 7, 1984, for a violation of section 75.1704, for failure to install ladders at an escapeway (Exhibits G-3 and G-6). MSHA produced none of the inspectors who issued these citations.

With regard to MSHA's inspection and enforcement actions subsequent to February, 1985, MSHA produced copies of nine section 104(a) citations issued during the period March 3, 1985 through October 22, 1986, for violations of the roof control requirements of section 75.200 (exhibit G-3); six section 104(a) citations issued during the period July 23, 1985 through August 14, 1986, for violations of 75.301, because of inadequate air ventilation in the last open crosscut (exhibit G-4); two section 104(a) citations issued on April 10 and August 14, 1986, for violations of section 75.316 because of missing permanent stoppings (exhibit G-5); and four section 104(a) citations issued during March 10, 1985 through October 16, 1985, for violations of section 75.1704, because of failures to provide ladders at certain escapeway locations, and failure to clean up debris from escapeways (exhibit G-6). One section 104(b) order was issued on March 10, 1986, for failure to abate an escapeway violation which was issued on June 7, 1984 (exhibit G-6).

MSHA also failed to produce for testimony any of the inspectors who issued the post-February, 1985, citations. However, I note that in each instance, the inspectors made gravity findings of "reasonably likely," and negligence findings ranging from "moderate" to "low" on the face of the citation forms. Further, although Mr. Schoffstall reviewed and identified the citations during the course of the hearing, he conceded that he did not issue any of the citations, and that he was not present during any of the inspections which resulted in the issuance of the citations. Consequently, MSHA has presented no credible or reliable probative testimony concerning the prevailing mine conditions at the time these citations were issued.

I have reviewed the copies of the abatement and termination notices concerning all of the aforementioned citations which MSHA produced in response to the operator's pretrial discovery requests, and I find that with the exception of the one section 104(b) order for failure to abate a violation of

section 75.1704, which MSHA had extended for over a year and a half, all of the remaining violations were timely abated within the initial or extended time fixed by the inspectors for abatement. I also find that in the case of one of the violations issued on July 24, 1985, for a violation of section 75.301, MSHA noted that the operator took immediate action to abate the violative ventilation conditions, and in another violation issued on June 11, 1986, for a violation of section 75.301, MSHA vacated the violation after finding that sufficient ventilation was in fact provided.

In response to the operator's pretrial discovery requests for an identification and description of any "especially hazard condition" which MSHA maintains exists at the mine, and the dates on which these conditions were discovered and communicated to the operator, MSHA's counsel provided a narrative summary suggesting that the mine has methane problems, roof control problems, an inconsistent ventilation system, and a need to monitor a projected development toward impounded water (See Addendum #6 Answer to Interrogatories).

The aforementioned summary makes reference to certain air measurements made on the ventilation intake system on October 22 and 30, 1986, and March 23, 1987, and one sample taken in an immediate return on March 24, 1987. It also contains a number of undocumented conclusions concerning the mine ventilation and roof control, and there is no indication as to who may have prepared the summary.

MSHA's response identifies October 22 and 30, 1986, and March 24, 1987, as the dates that the alleged "especially hazardous conditions" were discovered, and it refers to the previously issued citations concerning violations of sections 75.316, 75.301, 75.1704, and 75.200, in support of the alleged "especially hazardous conditions." These particular citations have previously been discussed. However, MSHA has presented no testimony or evidence documenting the October, 1986, and March, 1987, air ventilation tests, and there is no evidence that any citations were issued as a result of the air measurements MSHA has characterized in the summary as "especially hazardous conditions" existing in October, 1986, and March, 1987.

MSHA failed to produce any of the inspector's who may have conducted any methane or ventilation tests or surveys subsequent to the February 10, 1982, ignition incident. Mr. Schoffstall confirmed that he personally never conducted any such tests in the mine, and while he asserted that he has accompanied other inspectors when they took such tests, no

details were forthcoming, and MSHA produced none of the inspectors. Although Mr. Schoffstall alluded to some nebulous loss of 50 percent of air in the mine ventilation circuit, his assertion in this regard remains unexplained, and he conceded that he performed no test to support any such statement.

Mr. Schoffstall also conceded that absent the prior ignition of February 10, 1982, his perceptions that the mine may have some ventilation problems would not necessarily be reason enough to place the mine in a section 103(i) spot inspection status.

Mr. Schoffstall confirmed that MSHA wishes to keep the operator on a section 103(i) spot 5 day inspection cycle because of alleged adverse roof conditions, ventilation problems, and excessive methane liberation in the mine. Although he is not identified as the source of MSHA's "especially hazardous conditions" discovery summary, since he was the only MSHA witness called to testify in this case, I assume that the information in the summary came from him. As indicated earlier, Mr. Schoffstall admitted that he has never conducted any air ventilation tests, did not issue any of the prior citations produced by MSHA, and that he was not present when those citations were issued. I believe that Mr. Schoffstall's opinions, conclusions, and speculations concerning the roof, ventilation, and methane conditions which MSHA has identified as the "especially hazardous conditions" warranting continuous section 103(i) inspections every 5 days, are based on his review of the prior citations and the overall mine compliance record, rather than personal experience. Under the circumstances, I find his testimony to be of little credible or probative value.

With regard to the alleged mine ventilation "problems," although Mr. Schoffstall was of the opinion that the mine ventilation system was "borderline," he admitted that the ventilation system under which the mine has operated has MSHA's approval. Further, the record in this case reflects that in the most recent past 2-years, the operator has been cited only two times for violations of the ventilation plan requirements of section 75.316, because of some missing stoppings, and the violations were timely abated.

With regard to the air ventilation requirements of section 75.301, Mr. Schoffstall confirmed that the last time he was in the mine to discuss some temporary stoppings, he found that the operator was meeting the minimum air ventilation requirements of the law (Tr. 66), and that during MSHA's recent review of the operator's ventilation plans covering developing and anticipated development areas, MSHA has

approved the minimum requirements of 3,000 cubic feet of air a minute at the working face and 5,000 cubic feet of air a minute at the last open crosscut (Tr. 68). While it is true that the operator has received six citations in the past 2 years for violations of section 75.301, all of the cited conditions were timely abated, and in one instance, the operator immediately corrected the conditions, and in another, MSHA vacated the citation.

In view of all of the forgoing circumstances, and absent any other credible or probative testimony, I cannot conclude that MSHA has established that the mine ventilation system constitutes an "especially hazardous condition" warranting continuous MSHA inspections every 5 days pursuant to section 103(i) of the Act. Mr. Schoffstall admitted that any such ventilation monitoring may be accomplished by MSHA through its regular and follow-up inspections independent of section 103(i) (Tr. 69, 72). Although Mr. Schoffstall was of the opinion that the mine ventilation system is "borderline" and "inconsistent," there is no evidence that the operator has consistently violated its approved plan. If MSHA believes that this is the case, then it should seriously reflect on why it has continued to approve the operator's plans in the face of what it believes to be borderline and inconsistent conduct on the part of the operator.

With regard to the alleged adverse roof conditions in the mine, apart from the abated citations which have been issued for violations of section 75.200, I find no evidence that the operator has otherwise consistently failed to adhere to the requirements of its approved roof-control plan. Mr. Schoffstall confirmed that the operator inherited some problems when he took over the mine, and that some of the roof problems in the development areas are inherent to the present natural roof conditions in the mine. However, Mr. Schoffstall confirmed that the operator has constantly timbered and re-timbered mine areas where the roof is taking weight. He alluded to a recent unplanned roof fall which did not result in any injuries, and he confirmed that the operator addressed that problem by developing a new area to go around the fall, and establishing a new escapeway from that area (Tr. 64).

With regard to the operator's planned development in an area where there is impounded water, Mr. Schoffstall confirmed that when the mining cycle approaches to within 200 feet of the uncharted workings, the operator must start drilling in advance to locate the water. However, there is no evidence that the operator will not perform the advance work required by MSHA's regulations, and Mr. Schoffstall admitted that any

such requirements are independent of section 103(i), and that this situation would be addressed by MSHA by means of a special investigation to insure that proper procedures are followed (Tr. 75).

With regard to the four prior escapeway citations for violations of section 75.1704, I take note of the fact that three of the citations were timely abated, one was a non-S&S citation, and the abatement time for the remaining citation was extended by MSHA for over a year and a half. Mr. Schoffstall expressed some concern that a roof fall could block an escapeway, and MSHA's pretrial discovery summary pointed out that a recent unplanned fall left the escapeway impassable. However, the fact is that the operator immediately addressed and abated the problem by mining around the fall and providing another escape route. Although one may agree that a roof fall at an escapeway may prevent a miner from exiting the mine by that particular route, unless it can be shown that an operator regularly is out of compliance with section 75.1704, or has consistently allowed such conditions to exist to the point where it becomes an ongoing hazard in the mine, I cannot conclude that isolated and sporadic escapeway citations which are timely abated constitutes an "especially hazardous condition" warranting inspections every 5 days.

In view of the foregoing, I cannot conclude that MSHA has established that the escapeways, roof conditions, and the projected future development which may approach some impounded water constitute "especially hazardous conditions" warranting continuous MSHA inspections every 5 days pursuant to section 103(i).

As previously noted, MSHA's guideline published in the 1982 Inspector's Manual, states that inspections conducted pursuant to section 103(i) of the Act should be made with respect to the hazard(s) that caused the mine to be placed in this category. Mr. Schoffstall confirmed that two other mines in his district are on section 103(i) 5-day inspection cycles because of water impoundment problems, which he considered to be a readily identifiable ongoing hazard (Tr. 55). I assume that once the water problem is cured, those mines will be removed from their section 103(i) status. With regard to the other mine operator whose mine is in close proximity to Mr. Rothermel's, and which was on a section 103(i) status for 7 years, because of a methane ignition or explosion, Mr. Schoffstall confirmed that it has been removed because of improvements in the air ventilation system and a decrease in the amount of methane liberated at the face.

On the facts of this case, MSHA has suggested that the "other especially hazardous conditions" which are present in the mine, and which authorizes it to continue to inspect the mine every 5 days pursuant to section 103(i), include not only ventilation problems, but problems with roof control, escape-ways, and a potential future water impoundment problem. However, the basis for placing the mine on the 5-day inspection cycle in the first place was the fact that a methane ignition or explosion occurred on February 10, 1982. MSHA concluded that the ignition was the result of improper blasting procedures, and the failure to follow proper ventilation practices. The improper ventilation practices were identified as inadequate ventilation controls such as overcasts, regulators, and stoppings, and the failure to properly check for methane before blasting. I find nothing in MSHA's investigative report to suggest that any adverse roof conditions, or the lack of inadequate escapeways, played any role in the accident. As a matter of fact, item #26, at page 5 of the report reflects that after the ignition, all employees were out of the mine in 10 minutes.

On the facts of this case, there is no question that the mine was initially placed on a section 103(i) 5-day inspection cycle because of the methane ignition which occurred on February 10, 1982. MSHA has tacitly admitted that were it not for that incident, the mine would not be on a section 103(i) inspection cycle. Mr. Schoffstall admitted that the mine was not placed in that category because of any other "especially hazardous conditions," and while he conceded that MSHA could place the mine in such a "spot inspection hazard" category, it has not done so in this case because "he was already in a section 103(i) situation" (Tr. 95). Mr. Schoffstall was of the opinion that MSHA "was locked into" that situation and stated that "we can't quit no more than the operator can quit for the five year period" (Tr. 107-108). Mr. Schoffstall was of the opinion that the 5 year reference in section 103(i) is "automatic," and MSHA's counsel was of the view that once an operator is placed in that position, the Act mandates that MSHA inspect the mine every 5 working days. When asked how long the operator would remain in that inspection cycle, MSHA's counsel responded "until it is taken off," and Mr. Schoffstall responded "for five years" (Tr. 108). Although I consider these responses to be contradictory, MSHA's counsel took the position that 5 years is only a minimum time frame, and that MSHA could continue to inspect the mine every 5 days beyond 5 years until it was satisfied that it no longer posed a potential hazard for a methane explosion.

Mr. Schoffstall conceded that his concerns with the mine deal with potential hazards (Tr. 55). He expressed concern over possible blockage of escapeways and restriction of ventilation due to roof falls (Tr. 64). He also expressed concern that given the present mine ventilation system, there may be insufficient quantities of air available at certain locations which are scheduled for development, and whether or not the ventilations system may be sufficient to carry away methane which may be encountered. Yet, the mine continues to operate under MSHA approved roof-control and ventilation plans.

Mr. Schoffstall conceded that roof control or ventilation control problems could develop in a mine at any time due to unknown facts and uncertainties, particularly in this mine which he claims has a "borderline" ventilation system. In my view, Mr. Schoffstall's concerns are based on speculative possibilities of events which may or may not occur, rather than on any credible evidence establishing the existence of any definitive "especially hazardous conditions" in the mine. All mines pose a potential for hazards connected with restricted ventilation and escapeways due to roof falls, and inadequate air ventilation due to some breakdown in the ventilation system. However, I find nothing in section 103(i) which authorizes MSHA to keep a mine on a continuous 5-day inspection cycle because of potential problems, subsequent isolated abated violative conditions which were not directly related to the event which initially placed in the mine in a section 103(i) posture, or MSHA's subjective undocumented judgments that the mine poses a "problem."

During closing arguments in this case, MSHA asserted that because of the multitude of hazards that are presented in the mining industry, especially in cases of small operators such as the one in this case, MSHA has discretion to maintain the operator here on a protracted 5-day inspection cycle and it need not wait until another methane explosion has occurred in the mine. Recognizing the fact that its perceived discretion may not be exercised in an unreasonable or illegal manner, and that it must establish good cause for keeping the operator on a continuous ongoing 5-day inspection cycle, MSHA concludes that it has established such good cause and has exercised its discretion in a reasonable manner. I disagree. I conclude and find that the only thing that MSHA has established is that the mine experienced a methane or gas explosion on February 10, 1982, which resulted in serious injuries to miners, which in turn triggered the placement of the mine on a 5 day section 103(i) inspection cycle.

I further conclude and find that MSHA has produced no credible or probative evidence to establish that the mine liberates excessive quantities of methane or other explosive gases during its operations, or that there presently exists in the mine "other especially hazardous conditions" justifying or warranting the continuation of the mine on a section 103(i) 5-day inspection cycle for as long as this particular operator stays in business. In short, I conclude and find that MSHA has failed to establish good cause or reasons for maintaining the operator in such a position. I further conclude and find that on the facts of this case, MSHA's unreasonable insistence on inspecting the mine every 5 days supports the operator's contention that such inspections have interfered with its right to operate its mine without undue interference from MSHA. I believe that MSHA has other available enforcement means at its disposal to insure that the operator here stays in compliance with its safety standards short of what I believe to be a rather arbitrary application of the requirements of section 103(i) of the Act.

In view of the foregoing findings and conclusions, I conclude that the operator's refusal to allow the MSHA inspectors entry to his mine for the purpose of conducting section 103(i) inspections was justified and does not constitute a violation of section 103(a) of the Act. Accordingly, the contested citations and order served on the operator ARE VACATED.

ORDER

IT IS ORDERED THAT:

1. Section 104(a) Citation Nos. 2840770 and 2840772, and section 104(b) Order No. 2840771, ARE VACATED.

2. MSHA's proposals for assessment of civil penalties ARE DENIED AND DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

James P. Diehl, Esq., Williamson, Friedberg & Jones, One
Norwegian Plaza, Pottsville, PA 17901 (Certified Mail)

Susan M. Jordan, Esq., Office of the Solicitor, U.S.
Department of Labor, Room 14480 Gateway Building, 3535 Market
Street, Philadelphia, PA 19104 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 10 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 85-169
	:	A.C.No. 46-02493-03536
v.	:	Quinland No. 1 Mine
QUINLAND COALS, INC., Respondent	:	

DECISION ON REMAND

Before: Judge Fauver

On September 30, 1987, the Commission remanded this case for a decision whether the violation of 30 C.F.R. § 75.200 (charged in Order No. 2144040) was the result of an "unwarrantable failure to comply with that mandatory safety standard" and for such further proceedings as are then appropriate.

In Florence Mining Company, PENN 86-297-R and PENN 87-16 (June 30, 1987), now pending review by the Commission, I held that the legislative history of § 104(d) of the Act shows that the phrase "unwarrantable failure to comply" means "the failure of an operator to abate a condition or practice constituting a violation of a mandatory standard it knew or should have known existed, or the failure to abate such a condition or practice because of indifference or lack of reasonable care." I also held that I do not interpret the Commission's decision in United States Steel Corporation, 6 FMSHRC 1423 (1984), as requiring a departure from the legislative history definition of "unwarrantable failure to comply." As I stated in Florence Mining Company, the Commission's statement in United States Steel, as follows:

but we concur with the Board to the extent that an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care

does not purport to be a restrictive definition based upon reconsideration of the legislative history, but appears to me to

be merely one kind of proof of an "unwarrantable failure to comply."

Whether the legislative history definition, stated in my decision in Florence Mining Company, or the example added by the Commission in United States Steel Corporation is applied in this case, I find on remand that Respondent demonstrated an unwarrantable failure to comply with the cited standard. The roof conditions were highly dangerous, they were known by mine management or should have been known by mine management for at least one or two months before the order charging a violation of 30 C.F.R. § 75.200. The conditions should have been corrected long before they were discovered by the inspector on October 11, 1984. Even though Respondent's witness McClure stated an opinion that the roof was adequately supported (an opinion I have rejected in favor of Inspector Thompson's opinion of a dangerous roof condition), McClure was aware that the roof control plan required that broken timbers be replaced and that there were some broken timbers that had not been replaced. On balance, I find that a preponderance of the substantial, reliable, and probative evidence shows that the violative roof condition was known by Respondent or should have been known by Respondent before October 11, 1984, and the failure to correct this condition was due to an unwarrantable failure to comply with 30 C.F.R. § 75.200.

In light of this finding, I find that my previous assessment of a civil penalty for \$800 is appropriate for this violation.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the total civil penalties assessed in this case, in the amount of \$1,300, within 30 days of this Decision on Remand.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

William D. Stover, Esq., Quinland Coals, Inc., 41 Eagles Road, Beckley, WV 25801 (Certified Mail)

kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 15 1987

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 87-129-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Citation No. 2704568; 3/4/87
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	Robinson Run No. 95 Mine
v.	:	CIVIL PENALTY PROCEEDINGS
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 87-193
	:	A. C. No. 46-01318-03752
	:	Robinson Run No. 95 Mine.

DECISION

Appearances: Michael R. Peelish, Esq., Pittsburgh, Pennsylvania for, Consolidation Coal Company;
James H. Swain, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act," to challenge a citation and order of withdrawal issued by the Secretary of Labor under section 104(d)(1) of the Act and for review of civil penalties proposed by the Secretary for the violations alleged therein.^{1/}

^{1/} Section 104(d)(1) of the Act reads as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and

At hearing the Secretary moved for the approval of a settlement agreement with the respect to Withdrawal Order No. 2704572 proposing a reduction in penalty from \$750 to \$500. I considered the representations in support of the motion and determined that the proffered settlement was appropriate under the criteria set forth in section 110(i) of the Act. That determination is now confirmed. Commission Rule 65, 29 C.F.R. § 2700.65.

The remaining citation at issue, No. 2704568, alleges a "significant and substantial" violation of the mine operator's ventilation plan under the regulatory standard at 30 C.F.R. § 75.316 and charges as follows:

The haulage doors located at No. 29 block that separated the 6 left, 4 North intake escapeway from the trolley haulage entry were not being maintained reasonably air tight and in a workmanlike manner as required by the approved ventilation plan. The haulage door beside the track was damaged to the extent there was a 22 inch opening across the top of the door, and the inby door was leaking air across the top and bottom of the door. The air being used to ventilate the trolley haulage entry was entering the intake escapeway through the doors. The haulage door beside the track was damaged on 02-28-87 and new doors were ordered 03-02-87 but there was no check curtain or stopping installed to stop the air from the trolley haulage entry from entering the intake escapeway.

I/continuation) Section 104(d)(1) of the Act:

substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

In relevant part, the mine operator's ventilation plan provides that "intake escapeway areas being isolated shall maintain a constant air pressure from the intake escapeway to the track." The plan also provides that "all [haulage] doors will be substantially built and maintained in a workmanlike manner."

The Consolidation Coal Company (Consol) does not dispute the allegations set forth in the citation at bar nor does it dispute that such allegations constitute a violation of its ventilation plan. Consol maintains however that the violation was neither "significant and substantial" nor caused by its "unwarrantable failure" to comply with the ventilation plan.

Ronald Tulanowski, an inspector for the Federal Mine Safety and Health Administration, (MSHA), entered the subject mine on March 4, 1987, at about 12:10 a.m. accompanied by company safety representative Sandy Eastham and union safety committeeman, Cecil Wilson. Proceeding to the 6 left, 4 North longwall section the group exited the personnel carrier in the No. 3 (track) entry at the No. 29 block. As he walked toward the haulage doors Tulanowski saw that the first door was bent out of shape and knocked off a hinge. This left a large opening at the top some 22 inches wide and 14 feet long through which ventilating air was passing from the No. 3 entry to the No. 2 entry (the intake escapeway). On the No. 3 entry side of the haulage door closest to the No. 3 entry the words "danger bad door" were written in chalk but no other markings or warnings were noted on either of the two haulage doors. The damaged door could not be rehung so it was therefore necessary to erect a temporary check curtain. Union safety committeemen Cecil Wilson corroborated Tulanowski in essential respects.

Eastham reportedly told Tulanowski that that the haulage door had been damaged on February 28th and that a new door had been ordered. Safety Supervisor Richard Paugh also informed Tulanowski that while the door had been previously damaged, it had also been repaired and was not leaking air. Tulanowski concluded that the violation was serious and "significant and substantial" because, in the event of a mine fire, smoke would contaminate the intake escapeway and working faces so that persons trying to escape through the smoke could stumble for lack of visibility or be overcome by smoke inhalation. It was about 400 to 500 feet from the doors to the face.

Tom Harrison was Consol's longwall coordinator during this time. At hearing he reviewed the preshift and onshift examination books beginning with the February 28, 1987, midnight shift (12:00 a.m. to 8:00 a.m.). He noted that a preshift examiner who performed his exam between 5:00 a.m. and 7:15 a.m.

on that date, had written the words "air lock door knocked out". That defect was noted again on preshift examinations through March 1, 1987. The examination for the midnight shift on March 2, 1987, showed that the condition had been "corrected" (Joint Exhibit No. 2)

Harrison himself learned of the defective haulage door upon reviewing the examination books on March 2nd and went into the mine to see the condition himself. Harrison then made temporary repairs on the door and wired it shut creating a "temporary stopping". He confirmed that the air was moving in the right direction and then wrote the words "danger-bad door" on the No. 3 entry side of the damaged door. He examined the door again on March 3rd at about 9:15 a.m. and it was in the same condition. According to Harrison the purpose of the doors was to permit the scoop to enter the track entry to pick-up crib blocks. The scoop was normally kept in a cross-cut off the No. 2 entry when not in use.

Stanley Nicholas, the long wall foreman, testified that he performed the preshift examinations on March 3rd, between 9:00 p.m. and 11:00 p.m. He visually inspected the airlock doors and confirmed that the trackside door was sealed. He recalled seeing the notation "danger-bad door" chalked upon the door.

Consol argues that the admitted violation was not "significant and substantial" because it existed only briefly. It maintains that the subject door had been wired shut and sealed by Tom Harrison on March 2, 1987. Harrison examined the door again on March 3, 1987, around 9:15 p.m. and found that air was not leaking into the intake escapeway. Finally it is undisputed that that Foreman Stanley Nicholas performed a examination between 9:00 p.m. and 11:00 p.m. on March 3, 1987 and found the doors to be sealed with no air movement into the intake escapeway. Consol therefore maintains that the damage to the door cited by Inspector Tulanowski must have been new damage that occurred sometime after that preshift examination on March 3, 1987, and before the time of the inspection at approximately 12:45 a.m. on March 4th.

The evidence in support of Consol's argument herein is indeed undisputed and it may therefore be inferred that the damaged condition observed by Inspector Tulanowski leading to his citation occurred sometime between 9:00 p.m. and 12:45 the next morning. However the fact that the inspector discovered the violative condition as soon as he did, does not negate the "significant and substantial" nature of it. The operative time frame for determining the reasonable likelihood of an injury includes the expected continuance of normal mining operations. Secretary v. Halfway Incorporated, 8 FMSHRC8 (1986). The evidence is not sufficient to clearly establish when the new

replacement door would have been erected to correct the violative condition in this case. Thus the serious hazard of smoke from a fire in the track entry which would reasonably be likely to pass into the intake escapeway and to the face areas, would be expected to exist for some time. Under the circumstances the violation was indeed serious and "significant and substantial." Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

Consol also argues that the violation was not caused by its "unwarrantable failure" to comply with the cited standard. In Zeigler Coal Company, 7 IBMA 280 (1977) the Interior Board of Mine Operations Appeals stated as follows:

[a]n Inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent it has found that an unwarrantable failure to comply may be proved by showing that the violative condition or practice was not corrected or remedied, prior to the issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care. United States Steel Corp., v. Secretary of Labor, 6 FMSHRC 1423 (1984). Upon the credible evidence in this case it is clear that the violative condition existed for such a brief period of time i.e. from sometime between the required pre-shift exam between 9:00 p.m. and 11:00 p.m. on March 3rd and 12:45 a.m. on March 4th that I cannot find that the violation was the result of indifference, willful intent, or a serious lack of reasonable care. The violation was not therefore caused by the "unwarrantable failure" of the operator to comply with the cited standard. For the same reasons I find Consol to be chargeable with lesser negligence.

In reaching this conclusion I have not disregarded the Secretary's argument that the violation had actually existed since February 28th when the damaged haulage door was first noted in the preshift book and that it remained uncorrected at least until the second shift on March 2nd, when Mr. Harrison testified that he sealed the door. The condition noted in the preshift book on February 28th has not been shown however to be the same condition that was cited on March 4th. The operator cannot fairly be charged with "unwarrantable failure" because of an earlier condition that has not been shown to have been the same or even similar to the condition cited five days later. It is

apparent moreover that the haulage door suffered additional damage in the few hours before the subject inspection and this was the damaged condition cited by Tulanowski on March 4th.

The Secretary also argues that since only the No. 3 entry-side-door was dangered off with the chalk sign "danger-bad door" and not the No. 2 entry door through which the scoop would be expected to first travel, there was insufficient warning to the scoop operator. In other words the Secretary argues that the No. 3 entry was not restricted effectively from use even after its temporary repair on March 2nd. Again however the failure to effectively restrict travel through the damaged haulage door for periods before the preshift exam between 9:00 p.m. and 11:00 p.m. on March 3rd cannot fairly be considered in relation to the citation at bar. The Secretary has not proven that a violation did in fact exist at any time before that preshift examination. Inasmuch as the evidence in this case shows that the specific violative condition cited herein did not occur until sometime after that preshift examination and before 12:45 a.m. on March 4th, the failure to have restricted travel during that relatively brief period of time was not therefore due to "indifference, willful intent or a serious lack of reasonable care".

Under the circumstances Citation No. 2704568 must be modified to a citation under section 104(a) of the Act. In assessing a civil penalty in this case I have also considered that the operator is large in size and has a substantial history of violations. I have also considered that the cited condition was abated as prescribed by the Secretary. Under these circumstances I find that a civil penalty of \$400 is appropriate.

ORDER

Citation No. 2704568 is modified to a significant and substantial citation under section 104(a) of the Act. Order No. 2704572 is affirmed. Consolidation Coal Company is hereby directed to pay civil penalties of \$900 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 15 1987

BOBBY SIZEMORE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 87-196-D
: BARB-CD-87-24
:
NALLY AND HAMILTON ENTERPRISES, :
INC., :
Respondent :
:

DECISION

Appearances: Phyllis Robinson Smith, Esq., Hyden, Kentucky, for Complainant;
Lloyd R. Edens, Esq., Cline & Edens, Middlesboro, Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Bobby Sizemore under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act", alleging that Nally and Hamilton Enterprises, Inc. (Nally) discharged him on February 13, 1987, in violation of section 105(c)(1) of the Act. In its Answer, Nally maintained that the Complaint was neither timely filed nor stated a claim for which relief could be granted. Following a preliminary hearing on these issues a bench decision was issued. That decision, with only non-substantive modifications, is as follows:

Of course, the threshold issue in this case is whether the original complaint filed with the Federal Mine Safety and Health Review Commission on July 7, 1987, was filed timely under the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

The statute provides in relevant part that if the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right within 30 days of notice of the Secretary's determination to file an action in his own behalf before the Commission charging discrimination or interference in violation of paragraph 1.

Now the record shows that Mr. Sizemore, the complainant in this case, received the Secretary's notice of his determination that no discrimination occurred, on May 7, 1987. This is evidenced, of course, by the return receipt, which is page 3 of Exhibit R-1. The record shows also that his complaint was not filed with the Commission until July 6, 1987. It appears that the Complainant concedes that his complaint was filed untimely, but he is arguing that the delay was excusable because the mine operator was not prejudiced by the delay (and indeed, there seems to be no dispute that there was no prejudice to the operator), because he was confused about the filing time purportedly believing he had 60 days and not 30 days to file, and because he called the Commission by telephone in reference to his complaint, which he maintains should be deemed to be a sufficient filing.

The legislative history of these provisions of the Act indeed lend some support to the contentions raised by the Complainant, and I will quote from that legislative history: "[f]urther, as mentioned above in connection with the time for filing complaints, this 30-day limitation may be waived by the Court in appropriate circumstances for excusable failure to meet the requirement."

Thus, within the framework of the Act, Commission decisions and the legislative history I do have the authority to extend the filing deadline if there is an excusable ground.

However, in this case, first of all, I do not find the excuse to be credible. First, Mr. Sizemore has shown that he can read and understand what he reads. He did this both at his deposition and at the hearing here today. He read from the Secretary's letter; that is, the letter from the Federal Mine Safety and Health Administration, the agent of the Secretary for purposes of these proceedings, and that letter was dated May 6, 1987, in which it is stated that Mr. Sizemore had 30 days to file with the Commission, and indeed, the letter itself provides the address of the Commission.

behalf with the Federal Mine Safety and Health Review Commission at the following address:

Federal Mine Safety and Health Review Commission; 1730 K Street, N.W.; Washington, D.C. 20006.

Section 105(c) provides that you have the right within 30 days of this notice to file your own action with the Commission.

Now Mr. Sizemore admits that he read that letter when he received it, and based on that, I find that he did, indeed, have actual notice of the 30-day filing requirement.

Mr. Sizemore nevertheless claims that he was confused about some 60-day filing requirement, and therefore, thought that in spite of the actual notice he had, that somehow he had actually 60 days in which to file with the Commission. Aside from the fact that I find that he had actual notice of the 30-day requirement and understood it, I reject this excuse of alleged confusion as not having any underlying basis. In particular he has shown no document or source for this alleged confusion. There is no letter; there is no testimony; there is no document setting forth any 60-day requirement that led to his alleged confusion. Of course, there is a 60-day filing requirement in Section 105(c)(2) of the Act but there is no allegation that he at any time had read that statutory language. I therefore reject the contention.

Finally, Mr. Sizemore claims that he called the Commission about the filing requirements and that this should be considered or deemed to be an adequate filing. However, I find this claim to be also deficient because, first of all, he cannot say when he made these telephone calls. Indeed it appears most probable, and it may reasonably be inferred, that he made these telephone calls only in response to Chief Judge Merlin's letter dated July 8, 1987, advising him of the additional procedures that he must follow to perfect his complaint. That letter is a matter of record in the official file and concerns certain follow-up procedures--for example, to notify the mine operator of the filing of the complaint--that Mr. Sizemore was required to follow before the perfection of his actual complaint to the Commission. Thus it appears that the

telephone calls came after the late filing of the complaint.

Under all these circumstances I must find that the original complaint was filed untimely under Section 105(c)(3) of the Act and that there are no grounds for allowing a late filing. I therefore find also that the preferred amendment is also untimely as it could only relate back to the filing of the original complaint. On this basis alone, the complaint and the amended complaint must be dismissed and there is no reason to proceed to the merits of the case.

I should say, however, that even assuming that the complaint had been timely filed, and that the amendment was granted, I do not find that either states a claim for which relief may be granted under the provisions of Section 105(c)(1) of the Act.

The original complaint reads as follows:

On February 13, 1987, at 20 until 4 in the morning we were cleaning up the pit. It got too narrow for both loaders, so I went to the other end to clean up the corner. I loaded the last load, dropped the bucket into the bed of the truck, and got out on the running board to talk to the truckdriver to let my knee loosen up a little bit.

I had been out of the loader about one-and-a-half minutes. Les came by in his truck, pulled up and got up in the loader, and told me he didn't want to see this damn shit no more. "I asked him what he was talking about, and he said, 'You out on the running board talking to the truck drivers.'

I told him this was the first time I had been out of the loader since dinnertime at 12:30, and it was 20 until 4, and my knee stiffened up on me.

He said, "I've had about all I can take of you. Now get your ass back to work and clean this up."

So I went back to work and worked until cleaning time at 4:30. I parked my loader, and he pulled up beside me, and I walked over

to the truck and told him from now on when he wanted something done, he didn't have to cuss at me. He shoved his truck in park and told me he was the boss and would cuss anytime he wanted to. So he got out of his truck and I walked to the other side and told him he might cuss, but he wasn't going to cuss at me. He said he would cuss at me anytime he wanted to, and took his left hand and put on my right shoulder, shoving me and hitting me in the ribs with his right hand. We then proceeded to fight, and I got fired. If found in my favor, I want my job back with full pay and 11 benefits, including medical benefits paid with no reduction in employment time"

Now the proposed amended complaint charges as follows:

Mr. Sizemore testified at his deposition on October 12, 1987, that he had a problem with his knee when he operated equipment for a long time, and that the knee would stiffen up on him.

Mr. Sizemore had been advised that he was not allowed to take breaks from running the equipment, but could occasionally get out and stretch his legs, as long as it did not look like a break.

On the occasion that caused the altercation, this was what he was doing. If Mr. Sizemore had been permitted to take the legally mandated breaks, this incident would not have occurred, and the failure to permit breaks is a violation of the Mine Safety and Health Act.

As stated today at these proceedings, the motion to amend the original complaint has actually been further amended in that it is now not claimed that it was a violation of the Mine Safety and Health Act for the alleged failure of the operator to allow legally mandated work breaks, but it is a violation of a Kentucky wage and hour law that apparently requires an employer to grant ten minute breaks for each four hours of work.

Let me read, first of all, from Section 105(c)(1) of the Act. It provides, in essence, that:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the

statutory rights of any miner because such miner has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent of an alleged danger or safety or health violation in a mine, or because such miner has instituted or caused to be instituted any proceeding under or related to this Act, or because of the exercise of such miner of any statutory right afforded by this Act.

The original complaint asserts only that, in essence, Mr. Sizemore was fired because he was involved in a fight, which was started by an argument over his being "cussed" at by his supervisor. While it certainly may not have been pleasant or nice for his supervisor to "cuss" at him, this certainly has nothing to do with the purposes or the specific statutory protections afforded by Section 105(c)(1).

In the amended complaint, Mr. Sizemore asserts, in essence, that the Respondent violated a Kentucky wage and hour law regarding ten-minute breaks, and that his was the basis for his cussing and fighting, and therefore, somehow the Complainant is thereby protected under the Mine Safety Act.

However, there is no allegation anywhere in the original or amended complaint that Mr. Sizemore had filed or made a complaint under or related to the Act which might be construed as even incorporating a complaint notifying the operator or the operator's agent of an alleged danger or safety or health violation in the mine. Nor certainly was there any allegation that Mr. Sizemore had instituted or caused any proceeding to be instituted under or related to the Act. For that matter, there is no allegation that Mr. Sizemore exercised any statutory right afforded by the Act. Finally, there is no allegation that Mr. Sizemore at any time exercised any refusal to work or work refusal as that is construed within the terms of the Mine Safety Act.

Thus, even assuming that the original complaint was filed timely, and assuming that the motion to amend the complaint was granted, I would nevertheless find that the Complainant would have, in any event, failed to state a claim for which relief may be granted under Section 105(c)(1) of the Act, and the complaints would in any event therefore be dismissed.

Under the circumstances, this case is therefore dismissed. There is no reason then to reach the merits of the case, and

I will prepare a final written decision incorporating this bench decision which will be prepared upon receipt of the transcript in these proceedings, and that will constitute the final disposition of this case.

ORDER

The bench decision rendered in this case is hereby confirmed and this case is dismissed.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Phyllis Robinson Smith, Esq., P.O. Box 952, Hyden, KY 41749
(Certified Mail)

Lloyd R. Edens, Esq., Cline & Edens, P.O. Drawer 2220,
Middlesboro, Kentucky 40965 (Certified Mail)

npt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 16 1987

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 87-69
CONSOLIDATION COAL COMPANY, Respondent	:	A.C. No. 46-01453-03742
CONSOLIDATION COAL COMPANY, Contestant	:	Humphrey No. 7 Mine
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 86-449-R
	:	Order No. 2713396; 7/21/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 86-450-R
	:	Order No. 2713397; 7/21/86
	:	Humphrey No. 7 Mine

DECISIONS

Appearances: Therese I. Salus, Esq., Office of the
Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for the
Petitioner/Respondent;
Michael R. Pelesh, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent/Contestant.

Before: Judge Koutras

Statement of the Case

These consolidated proceedings concern a civil penalty proposal filed by MSHA against the Consolidation Coal Company pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of \$900 for an alleged violation of mandatory safety training standard 30 C.F.R. § 48.7, as stated in a section 104(a) "S&S" Citation No. 2713397, issued by an MSHA inspector on July 21, 1986, (Docket No.

WEVA 87-69). Docket No. WEVA 86-450-R is the contest filed by the Consolidation Coal Company challenging the legality of the citation and the inspector's special "S&S" findings. Docket No. WEVA 86-449-R is the contest challenging the legality of a section 104(g)(1) Withdrawal Order No. 2713396, issued by the inspector on July 21, 1986, in conjunction with the aforesaid contested citation. The order was issued to withdraw an alleged untrained miner from the mine until such time that his training has been completed.

A consolidated hearing was held in Morgantown, West Virginia, and the parties were afforded an opportunity to file posthearing briefs, and they have done so. I have considered all of the arguments made by the parties in these proceedings in my adjudication of these matters.

Issues

The issues presented are (1) whether the condition or practice cited by the inspector constituted a violation of the cited mandatory safety training standard, and if so, (2) the appropriate civil penalty to be assessed for the violation, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Also at issue is the question of whether or not the alleged violation was significant and substantial (S&S), and whether or not the withdrawal of the alleged untrained miner was justified.

Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1 et seq.
3. 30 C.F.R. § 48.7.

Procedural Ruling

MSHA's motion to amend Citation No. 2713397 to reflect an alleged violation of 30 C.F.R. § 48.7 the training requirements applicable to underground mines, rather than section 47.27, the standards applicable to surface mines, was granted from the bench (Tr. 10-11).

Stipulations

The parties stipulated to the following:

1. The subject mine is owned and operated by the respondent/contestant.
2. The subject mine and the respondent/contestant are subject to the jurisdiction of the Act.
3. The presiding judge has jurisdiction to hear and decide these cases.
4. The citation and order issued in these proceedings were properly served on the respondent/contestant by an agent of the Secretary of Labor, and they may be admitted as part of the record in these proceedings for the purpose of establishing that they were properly issued and not for the purpose of establishing the truth of the conditions or practices stated therein.
5. The parties agree to the authenticity of their respective hearing exhibits.
6. The cited conditions or practices were timely abated by the respondent/contestant.
7. The 1986 annual coal production for the subject mine was 2,809,067 tons. The annual coal production for the respondent/contestant for all of its mines was 38,068,032 tons.
8. The assessment of a civil penalty for the violation in question will not adversely affect the respondent/contestant's ability to continue in business.
9. The respondent/contestant's history of prior violations for the 2-year period prior to the issuance of the citation in question consists of 778 violations issued during 946 inspection days, or .82 assessed violations per inspection day.

The parties also agreed that in the event the citation is affirmed, the subsequently issued section 104(g)(1) order should be affirmed.

Discussion

The essential facts in this case are not in dispute. On July 19, 1986, an accident occurred in the mine when an employee was pinned against a coal rib by an S&S scoop operated by another employee, Brad Slaman. The accident victim was hospitalized and lost time from work. MSHA Inspector Leonidas W. Gibson conducted an accident investigation on July 21, 1986. In addition to interviewing mine personnel, Mr. Gibson reviewed Mr. Slaman's training records maintained by Consol pursuant to 30 C.F.R. § 48.9. Although those records revealed that Mr. Slaman had been properly trained in the safe operation of several pieces of equipment, including a personnel carrier, shuttle car, and loader, Mr. Gibson could find no training records indicating that Mr. Slaman was trained in the operation of a scoop, and Consol's safety department could not produce any such records. Further, although Mr. Slaman advised the inspector that he had received scoop training, he too was unable to produce copies of any scoop training certificates. Consequently, the inspector concluded that Mr. Slaman had not been trained in the operation of a scoop, and he issued a citation charging a violation of 30 C.F.R. § 48.7.

The citations and order issued in these proceedings are as follows:

Docket Nos. WEVA 87-69 and WEVA 86-450-R

Section 104(a) Citation No. 2713397, July 21, 1986, states as follows:

'A scoop operator, Brad Slaman, did not receive task training in the safe procedures of operating a scoop, in LWG before transporting longwall equipment in the 7-Butt section. A 104-G-a Order No. 2713396 and a 107(a) Order No. 2711441 have been issued in conjunction with this 104(a) citation.'

Walter D. Hunt, Section Foreman, was in charge of this section.

Section 104(g)(1) Order No. 2713396, July 21, 1986, states as follows:

A scoop operator Brad Slaman did not receive task training in the safe procedures of operating a scoop before transporting longwall equipment in the 7-Butt section, which resulted in a serious accident to another miner.

This order is to remove Brad Slaman from the mine until training has been completed in the safe procedures of operating a scoop.

A 104(a) citation has been issued in conjunction with this order. Walter D. Hunt, Section Foreman, was in charge of this section.

MSHA's Testimony and Evidence

Leonidas W. Gibson, testified that he is a retired MSHA inspector, and he confirmed that he participated in an accident investigation at the mine on July 21, 1986, and as a result of that investigation he issued Citation No. 2713397, including the modifications attached thereto (Tr. 15-16, Exhibit G-1).

Mr. Gibson stated that mandatory training section 48.7 requires that a miner assigned to a particular piece of equipment such as a scoop be trained so that he is able to operate it in a safe manner. Mr. Gibson confirmed that the standards require that such training be recorded, and he confirmed that he issued the citation after determining that the operator's records did not reflect that Mr. Slaman was trained in the operation of the scoop he was operating at the time of the accident. Mr. Gibson stated that Mr. Stan Brozik, the mine safety director, produced training records which reflected that Mr. Slaman had operated several different pieces of equipment, but not an S&S scoop. Mr. Gibson produced a copy of his notes made at the time of his inspection, and he confirmed that the company records produced by Mr. Brozik indicated the types of equipment for which Mr. Slaman was trained to operate, and that it did not include a scoop (Tr. 18-14, Exhibit G-4).

Mr. Gibson stated that Mr. Slaman was operating an S&S scoop at the time of the accident. He confirmed that when he discussed the training records with Mr. Brozik, he stated that

Mr. Slaman had been trained on the scoop. Mr. Gibson also confirmed that when he later spoke with Mr. Slaman, Mr. Slaman informed him that he had been trained on the scoop but could not find his training record to confirm this. Mr. Gibson subsequently asked Mr. Brozik again about the training records, and Mr. Brozik could not produce any record of Mr. Slaman's scoop training (Tr. 26).

Mr. Gibson confirmed that he did not issue a citation for a violation of 48.9, which requires the mine operator to keep training records, because Mr. Brozik did produce records reflecting Mr. Slaman's training. Mr. Gibson stated that his conclusion that Mr. Slaman was not following normal operating procedures while operating the scoop was based on Mr. Slaman's admission during his investigation that he did not know the location of his scoop helper and did not know that he had moved back to the corner of the machine when he placed the scoop in operation to move a piece of equipment (Tr. 31-32).

Mr. Gibson stated that the purpose of section 48.7 is to prevent accidents, and that if a person is properly trained and knows how to operate a scoop in a safe manner, he can prevent himself and someone else from being injured (Tr. 33).

Mr. Gibson confirmed that the injury to the helper resulted from Mr. Slaman's failure to know his location when he started and moved the scoop. The injured man was hospitalized, but he subsequently returned to work (Tr. 34).

Mr. Gibson stated that the operator was aware that Mr. Slaman was not trained in the operation of the scoop because it had no training record to confirm his training, and that this was the operator's responsibility. Mr. Gibson confirmed that the violation was abated after Mr. Slaman was re-trained, and he returned to work on July 23, 1986, and the citation was terminated at that time (Tr. 35).

Mr. Gibson confirmed that he issued a section 104(g)(1) order in conjunction with the citation in order to prevent anyone else from being injured, to insure that Mr. Slaman was re-trained so that he could do a better job in the future, and to remove Mr. Slaman from operating the scoop until he received training in its operation (Tr. 35-38, exhibit G-2).

Mr. Gibson believed that the gravity was highly likely to produce an injury or illness because one person was injured and others could have been injured if Mr. Slaman were not properly trained (Tr. 38-39).

his citation for a violation of section 48.7 on the fact that the company had no Form 5023 in Mr. Slaman's file (Tr. 46). Mr. Gibson stated that in his experience as an MSHA inspector and investigator, it is not uncommon for a trained employee to be involved in an accident (Tr. 47). He confirmed that a gravity finding of "high" or "highly likely to happen" could be modified to "moderate" if an employee involved in an accident had received training (Tr. 48).

Mr. Gibson stated that Mr. Brozik did not advise him why he could not find a record of Mr. Slaman's scoop training, and he could not recall Mr. Brozik telling him that Mr. Slaman had previously worked at another Consol operation in the Mannington/Fairmont area (Tr. 50). He also confirmed that Mr. Brozik did not tell him that Mr. Slaman had been "grandfathered" in terms of any training requirements, or that he had worked at another Consol operation (Tr. 51).

Mr. Gibson confirmed that if a miner is trained at one mine or another company and there is a record of that training, he would not necessarily be required to be trained again when he transferred jobs to another company, but he would have to be trained on the particular type of machine that he is operating. He would also have to be re-trained if the machine is different from the one that he previously operated. If his machine controls are different or if the seating position is different, he would have to be re-trained (Tr. 51).

Mr. Gibson described the similar characteristic's and parts of a hinged scoop which articulates at a hinge point normally located at the center of the machine (Tr. 52-53). He confirmed that a scoop is a versatile piece of equipment, and that it is used to carry and move longwall equipment and pan lines (Tr. 53). Mr. Gibson stated that in his mining experience, he has never considered a Unitrac to be synonymous with a scoop. He believed that a Unitrac was a different piece of equipment and "some type of longwall equipment" (Tr. 54). Mr. Gibson confirmed that he recently learned that a Unitrac may be a scoop when MSHA's attorney informed him of this (Tr. 55).

In response to further questions, Mr. Gibson stated that during his investigation, Mr. Slaman advised him that he observed his helper in front of him, and that when he put the scoop in motion, the helper was beside him and was pinned against the rib when the scoop swiveled as he maneuvered it to move the longwall pan line. Mr. Gibson believed that there was a lack of communication between Mr. Slaman and his helper,

before moving the machine. He assumed that this was the case because the helper was pinned against the rib by the swiveling action of the scoop when Mr. Slaman put it in motion. Proper training requires that a scoop operator makes sure that his helper is in the clear before he operates his machine. Since the machine is hinged and moves quickly, the scoop operator is not supposed to have a man standing near him when he is operating the machine (Tr. 57-60).

Respondent's Testimony and Evidence

Brad Slaman, belt motorman, testified that he has worked for Consol at the Humphrey No. 7 Mine for 8 or 9 years. Prior to that, he worked at the Consol No. 20 Mine from October, 1977, for a little over a year. He was laid off from that mine and then went to work for Republic Steel. Five or 6 months elapsed from the time he worked at the No. 20 Mine until he went to work at the Humphrey Mine. He worked at the No. 20 Mine as a general laborer shoveling belts, and delivering cribs and supplies. In performing these duties, he had occasion to operate a Unitrac. He described the Unitrac as a machine basically the same as a scoop, and he indicated that it steers the same and pivots in the middle (Tr. 61-63).

Mr. Slaman stated that he was trained in the operation of the Unitrac at the Consol No. 20 Mine by safety supervisor Rudy Banick sometime in 1978, and that the training consisted of Mr. Banick explaining to him how the machine operated and reading him the Safe Work Instructions (SWI) for the operation of the machine, including safety items such as watching out for his helper, checking the machine over, checking the oil, and ringing the bell before putting it in operation (Tr. 64).

Mr. Slaman stated that after his initial training on the Unitrac scoop, he would operate the machine several times a year in order to stay trained in its operation, and he believed that he only had to operate it at least once in 12 months to meet MSHA's training requirements. It was also his understanding that he had to be trained if the machine was modified. Mr. Slaman was not sure that the Unitrac on which he was trained by Mr. Banick at the No. 20 Mine was a S&S model, but he believed that all of Consol's scoops were S&S models (Tr. 65).

Mr. Slaman stated that when he went to work at the Humphrey No. 7 Mine, he operated equipment similar to that which he operated at the No. 20 Mine, and that from 1978 when he was initially trained, until 1986 when the accident

, ... since 1981 and 1982 he has operated a scoop "pretty continuously" (Tr. 66).

Mr. Slaman stated that while employed at the Humphrey Mine he was trained in the operation of a scoop by at least 10 individuals, including Norman Cutright, and David Hunt. He confirmed that Mr. Hunt retrained him on the scoop after the accident, and that prior to that time he observed him operating the scoop, and had retrained him several times. He also received scoop training from one Charlie Johnson. Mr. Hunt's training included a review of scoop safety topics at least three times, and instructions in the operation of a scoop while working under Mr. Hunt's supervision. Prior to assigning him a task, Mr. Hunt would inquire as to his scoop training, and Mr. Slaman informed Mr. Hunt that he was trained in the operation of the scoop (Tr. 67-69).

Mr. Slaman stated that after being trained by Mr. Hunt, he would give him a "blue retraining slip," and since they were dirty, Mr. Slaman would place them in his pocket or dinner bucket. His wife would either throw them away or launder them with his shirts and he has not retained them. He has also moved several times, and he has not been able to find any of the training slips (Tr. 70).

Mr. Slaman stated that Norman Cutright, the longwall boss at the Humphrey Mine has trained him in the operation of a scoop, and that Mr. Hunt had trained him in the operation of a Model 601 S&S scoop, the same type of scoop he was operating at the time of the accident (Tr. 71).

Mr. Slaman stated that his duties as a longwall shieldman required him to operate a scoop, and that Mr. Cutright trained him on the scoop before two longwall moves in 1983 and 1984. Since longwall moves are dangerous, experienced scoop men are necessarily assigned to this work. Mr. Slaman also operated scoops while doing work other than longwall moves, and he described this work (Tr. 72). During the 2 years that he worked under Mr. Cutright's supervision from 1983 to 1984, Mr. Slaman estimated that he operated a scoop at least 60 or 70 times (Tr. 73).

Referring to exhibit G-4, the inspector's notes and sketch of the accident scene, Mr. Slaman explained what happened on the day of the accident. He stated that he was in the process of moving a section of the pan line along the left rib and that the pan line was in front of the scoop. He and his helper were discussing how the pan line would be moved,

his view. Mr. Slaman then started the machine and rang the bell and shoved the pan line against the rib with the scoop. The scoop pivoted toward the right rib and he heard a grunt and turned around and observed that he had pinned the helper against the rib. Mr. Slaman stated that his line-of-sight was toward the left-hand rib and that when he advanced the scoop to move the pan line, he could not recall where the helper was located because he was studying the pan line. He last recalled the helper being in front of him, and he believed that the helper was watching him move the pan line and was not paying attention to the scoop. Mr. Slaman stated that "I didn't watch him, so I really don't know what he did" (Tr. 73-76).

Mr. Slaman stated that the Unitrac 488 scoop on which he was trained at the No. 20 Mine had the same center pivot point, steered the same, and had the same bucket and battery as the 601 S&S scoop. The Unitrac was "a hair smaller" than the S&S scoop (Tr. 76-77).

On cross-examination, Mr. Slaman reviewed his prior mining work and experience, and the scoop training he received at the No. 20 Mine. He confirmed that he received initial training on the scoop at the Humphrey Mine sometime in 1980, and that the training consisted of a review of the safety aspects of the scoop, reading the SWI, and his boss observing him operating the machine and discussing specific "do's and dont's" with him. Mr. Slaman stated that he operated the scoop 20 times in 1980, 30-40 times in 1981, 50-60 times in 1982, 1983, and 1984, and 20-30 times in 1985 and 1986. During these periods he operated the 601 S&S scoop, and on occasion operated an Elkhorn scoop, and a 610 scoop which were larger than the 601 (Tr. 77-83).

Mr. Slaman described his various jobs and duties at the mine requiring him to operate scoops, and he confirmed that there is no specific job classification of scoop operator at the Humphrey Mine (Tr. 84-86).

Mr. Slaman confirmed that on each occasion when he was trained, he received a "blue training slip," but that he no longer has them, and they were either washed in the laundry or thrown away. He stated that Mr. Hunt trained him on the 601 S&S scoop sometime between the end of 1985 and the end of 1986, and that Mr. Hunt observed him operating the machine to make sure that he was operating it safely. Mr. Slaman confirmed that Mr. Hunt gave him a "retraining slip" after he observed him operating the machine (Tr. 88-89). Mr. Slaman

explained that he threw away his training slips because they were "dirty and grubby you end up sticking it in your pocket or forget about them." Mr. Slaman stated that the individuals who trained him retained a copy of the training slip, and they are required to turn it in to the company, and he assumed that this was done in his case (Tr. 90).

Mr. Slaman stated that 2 or 3 weeks before the accident Charlie Johnson trained him on the scoop (Tr. 91), and that he was also trained by Norman Cutright. Mr. Cutright advised him that he turned his training slips into the safety department, and Mr. Slaman indicated that as far as he knew the safety department only had records of his training at the No. 20 Mine (Tr. 95). Mr. Slaman stated that the training he received from Mr. Johnson consisted of Mr. Johnson reading the "SWI Form" to him and reviewing the safety aspects of the scoop. Mr. Johnson wanted to insure that everyone had their training up to date in anticipation of the longwall, and he did not review the machine controls because "we were all familiar with the scoop anyway" (Tr. 96-97). Mr. Slaman confirmed that he received a scoop training certificate from Mr. Johnson, and stated that 4 or 5-days prior to the hearing, Mr. Johnson informed him that he had turned a copy in to the safety department as was his usual practice (Tr. 98).

Mr. Slaman confirmed that copies of all training slips are usually kept in his file with the safety department, and that those records do contain copies of training slips for other equipment for which he was trained (Tr. 98). He confirmed that he was trained in the operation of a 488 Unitrac at the No. 20 Mine in 1977 to the end of 1978, and that he has been in the Humphrey No. 7 Mine for approximately 8 or 9 years (Tr. 99).

Mr. Slaman stated that the 601 and 610 S&S scoops are basically the same, except that the 610 is bigger and the operator's compartment is at the rear of the machine, and the operator sits at the front of the 601 model. The controls, throttle, braking mechanisms, hydraulics, and steering are the same for both machines, but the visibility is reduced in a 610, and he did not consider it to be a good piece of machinery because of its larger size, and the fact that one needed to have a helper with him because he cannot see the blade from the operator's compartment. In his opinion, the two scoops operate the same way, and he does not have to be trained when going from one machine to the other (Tr. 104-106).

Mr. Slaman described the 488 Unitrac scoop which he operated in the No. 20 Mine, and confirmed that it is not used at the Humphrey No. 7 Mine. He stated that S&S scoops are used in this mine, and that he was operating a standard 601 S&S scoop at the time of the accident, and that the 610 model is rarely used except for heavy work. He confirmed that the operator's compartment on the 601 model is at the front, the same as on the Unitrac, and that the controls, brakes, and trammimg pedals are also the same as the Unitrac, and that Mr. Hunt, Mr. Johnson, and Mr. Cutright all trained him on the 601. He also confirmed that he operated an Elkhorn Scoop, four or five times, but could not recall when, and that his training on that model was exactly like the training he received for the 601 (Tr. 109-111).

Mr. Slaman explained that the "retraining" he received to abate the violation consisted of someone re-reading the Safe Work Instructions (SWI) to him (Tr. 117). He was then required to sign a safety training form attesting to the fact that the SWI was read to him, and that the training form is maintained by the safety department. The SWI's are kept on the section where the scoops are operated, as well as in the safety department (Tr. 124).

Norman Cutright testified that he has worked at the Humphrey No. 7 Mine for over 17 years, and has served as a supervisor for 6 years. He has served as a longwall boss and section foreman, and confirmed that he was Mr. Slaman's supervisor for approximately a year and a half until a realignment in December, 1984. He also confirmed that during this period, he trained Mr. Slaman in the operation of a scoop, using the applicable Safe Work Instructions (SWI) for scoop operators, and he identified a copy of the SWI used for this training, and explained the respondent's MSHA approved training procedures he followed (Tr. 130-134; Exhibit R-1).

Mr. Cutright stated that he trained Mr. Slaman in the operation of a scoop for the longwall move, and that during such moves "you need a real good man to run the scoop" (Tr. 136). He confirmed that he trained Mr. Slaman for one longwall move in February, 1984, using the SWI, and he explained how he did the training. He confirmed that at that time, Mr. Slaman was an experienced scoop operator, and that he observed him operating the scoop as part of his training. At the completion of this training, Mr. Cutright stated that he filled out a "5023 Form" kept in his foreman's book, gave Mr. Slaman his signed copy, and turned the remaining copies into the safety department. Mr. Cutright assumed they were placed in the company files (Tr. 136-138).

training, he trained Mr. Slaman again when he worked for him as a shieldman for a second longwall move which occurred sometime in September, 1984, and that he regularly observed Mr. Slaman operating a scoop during the time he worked under his supervision. This latter training consisted of the same SWI review procedures, and Mr. Cutright confirmed that he followed the same routine in documenting Mr. Slaman's training (Tr. 139). He further confirmed that on both occasions, Mr. Slaman was trained in the operation of a 601 S&S Scoop, and he considered Mr. Slaman to be a very good scoop operator. He confirmed that Mr. Slaman was selected for the longwall work because of his experience, and that this is critical due to the hazardous nature of longwall face work and that "you just don't put anybody on to run a scoop" (Tr. 141).

On cross-examination, Mr. Cutright stated that the SWI (exhibit R-1) pertaining to a battery-operated scoop, was the same one he used to train Mr. Slaman in 1984, and he confirmed that the scoops have not changed in the past 3 or 4 years (Tr. 142). He also confirmed that he has trained Mr. Slaman on other equipment, and that there have been no changes in the 601 S&S scoop (Tr. 143). He stated that when he trained Mr. Slaman in 1984, he did not review or verify his prior training, and that the February training was over a period of 2 days and probably not longer because Mr. Slaman was an experienced scoop operator, and the training included supervised personal scoop operational instructions and sessions, and practice sessions (Tr. 145). Mr. Slaman was again trained 6 or 7 months later as a matter of routine to insure that everyone on the longwall knew what was going on, and this training session included supervised operational sessions similar to the February training (Tr. 146). Mr. Cutright confirmed that he has never reviewed Mr. Slaman's training records (Tr. 147).

Mr. Cutright confirmed that the September, 1984, training consisted of his observations of Mr. Slaman operating the scoop, and did not include practice sessions because Mr. Slaman had been trained in that phase in February and it was "just a retraining type thing" (Tr. 148). Mr. Cutright confirmed that he was aware of the fact that there is no record in the safety department of Mr. Slaman's training, and he agreed that it was unusual not to have those records (Tr. 149). He could not further explain the absence of the records, and he confirmed that he has trained other miners, but has no idea whether or not their records are on file in the safety department (Tr. 150).

ent size, and confirmed that he had never seen one. He indicated that the term "Unitrac" is not one used in his mine, and that the term is sometimes mentioned by miners from different mines. When asked whether a 601 scoop is a Unitrac, he responded "I suppose it is, depending on what mine you're working in, I guess," and that "there are different names -- different mines use different names for some things" (Tr. 152). He confirmed that the scoop which Mr. Slaman was operating at the time of the accident was the same type of 601 scoop that he trained him on, and that since that training, he has not trained Mr. Slaman further because he was assigned to a different shift after the realignment (Tr. 153).

David Hunt testified that he has been employed at the Humphrey No. 7 Mine for 16 years, serves as an assistant shift foreman, and that he has been a supervisor for 10 years. He confirmed that he has supervised Mr. Slaman since the realignment in 1985, until a few months ago when he bid on a belt job. Mr. Hunt confirmed that he was Mr. Slaman's supervisor on the evening of July 19, 1986, when the accident in question occurred. Mr. Hunt confirmed that he has trained Mr. Slaman in the operation of a battery operated 601 S&S scoop, as well on other equipment. He stated that the first time he trained Mr. Slaman on the scoop was sometime in 1985 during the 6 Butt longwall move, and while he could not recall the specific dates, it may have been during the Fall of 1985. He also observed Mr. Slaman operating the scoop numerous times throughout the year while working under his supervision, and confirmed that he used the SWI, exhibit R-1, during his training of Mr. Slaman. He confirmed that the SWI is an MSHA approved means of task training, and that the training would have included his reviewing the SWI with Mr. Slaman, as well as his physical operation of the scoop. The review of the SWI would have taken a half-hour, and his observation of Mr. Slaman operating the scoop would have been over a period of separate days, including follow-ups until he was satisfied that Mr. Slaman could operate the scoop (Tr. 153-159).

Mr. Hunt stated that the mine uses 601 and 610 model scoops, and that they are basically the same, except that the 610 is larger. He may have also trained Mr. Slaman on the 610, and if he did, he would follow the same training procedures which he followed when he trained him on the 601 model. He confirmed that there are no separate training instructions for the two models. Since the realignment of late December, 1984, he has observed Mr. Slaman quite a few times using the scoop while unloading cribs, and setting up and tearing down

been trained on the scoop, Mr. Hunt would allow him to operate it. Mr. Hunt stated that he would be in violation of company policy if he permitted an untrained miner to perform a task for which he is not trained, and that due to day-to-day shift changes and realignments underground, training records are not readily available. In the event an employee informs him it has been 6 months or a year since he had initially training, he will fill out a basic "5023 form" or a retraining slip to be on the "safe side" (Tr. 161-162).

Mr. Hunt confirmed that Mr. Slaman was classified as a shuttle car operator when he worked under his supervision, but he was considered to be trained and experienced in operating a scoop, and the fact that he was a shuttle car operator did not forbid him from operating a scoop. Mr. Slaman was specifically assigned to the longwall because he was considered to be an experienced scoop operator, and at the time of the accident on July 19, 1986, they were in the process of another longwall move (Tr. 162).

On cross-examination, Mr. Hunt confirmed that he was on duty at the time of the accident, but was not present at the immediate scene (Tr. 164). He did not train Mr. Slaman prior to 1985, other than the one time on the 601 scoop, and his section foreman would have taken care of that. Mr. Hunt confirmed that prior to training Mr. Slaman, he asked him whether he had ever been trained in the use of the scoop, and he replied that he had. However, he did not review his training records at any time (Tr. 165). He confirmed that some of his follow-up supervision of Mr. Slaman in the operation of the scoop during longwall moves may have been on the 610 model, because it was used to unload cribs (Tr. 166). Although the 610 may have been on the section at the time of the accident, they were not being used that day, and he did not observe Mr. Slaman operating the 610 that day (Tr. 170).

Mr. Hunt stated that Mr. Slaman had the initial training indicated in the SWI for battery scoops, and it would make no difference whether he operated the 601 or 610 models, because they are basically the same machine, except that the 610 is larger (Tr. 171). He confirmed that his training of

him, and observed him going over his "check" procedures and operating the machine (Tr. 174). He did not fill out any training certificate at that time, because he was under the assumption that he had been initially trained, and he had observed him, and there was no need to fill out another certificate (Tr. 175-176).

Mr. Hunt explained the procedures he normally follows with respect to the filing of training certificates with Consol's safety department at the end of the month after training his employees. He confirmed that he keeps them in his pocket as they are accumulated before the end of the month, and that his wife has on occasion laundered some of them (Tr. 177). He confirmed that he was aware of the regulations concerning training record keeping and has followed them. He could not explain why Mr. Slaman's training records could not be located, and indicated that once he turns them in, "it's out of my hands" (Tr. 178). Mr. Hunt reiterated that he did not prepare a training certificate for Mr. Slaman after he trained him in 1985 because he believed that he had previously been trained, and he confirmed that after this training, he observed Mr. Slaman operating the 601 scoop. He assumed that Mr. Slaman had operated it at least 2 weeks before the accident occurred, because he knew he was assigned to the longwall and Mr. Slaman had indicated to him that "he had been up there for quite a while" (Tr. 178). Mr. Hunt did not observe him during this time because he was on vacation.

Mr. Hunt could not specify how often he observed Mr. Slaman operating the scoop between the time he trained him in 1985 and the time he went on vacation, but that anytime he would observe him on a scoop in his working area he would always check to see what work was done during the shift (Tr. 179). He specifically recalled one occasion when he sought out Mr. Slaman to advise him of a new state requirement that all scoop operators walk their roadways to check for debris, but he could not remember when this was (Tr. 180).

Mr. Hunt confirmed that he was not contacted or interviewed by any MSHA inspectors during the course of the accident investigation, and that Mr. Gibson did not talk to him before issuing the violation, and did not ask him about Mr. Slaman's training (Tr. 183).

Inspector Gibson was recalled by the Court, and he stated as follows:

Q. Mr. Gibson, you've been sitting here listening to all this testimony brought forward by Consolidation Coal Company with regard to the training that Mr. Slaman has received.

Okay?

A. Yes.

Q. Now, assuming I can believe all that testimony, from what you've heard today, do you feel this man has received adequate task training to comply with the regulations, based on what you've heard?

A. From what I've heard, if it's true, I think he has had adequate training. But there was no record of it.

Q. I understand that. And still, that hasn't been explained yet. Mr. Peelish opted not to call the record keeper and let me grill him. But from what you've heard of the testimony, you feel the man was adequately trained.

A. Yes.

Q. Have you ever had any similar occurrences as this were a mine operator hasn't been able to produce training records?

A. Vaguely, I remember one, I think, at Osage Number 3 Mine.

Q. Another Consol --

MR. PEELISH: Another Consol Mine.

Findings and Conclusions

Consol is charged with an alleged violation of mandatory training standard 30 C.F.R. § 48.7, which provides in relevant part as follows:

48.7 Training of miners assigned to a task in which they have had no previous experience; minimum courses of instruction.

mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators . . . shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section have been completed. . . . The training program shall include the following:

(1) Health & safety aspects and safe operating procedures for work tasks, equipment and machinery. The training shall include instruction in the health and safety aspects and the safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment, and

(2)(1) Supervised practice during non-production. The training shall include supervised practice in the assigned tasks, and the performance of work duties at times or places where production is not the primary objective; or

(ii) Supervised operation during production. The training shall include, while under brief and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

(3) New or modified machines and equipment. Equipment and machine operators shall be instructed in safe operating procedures applicable to new or modified machines or equipment to be installed or put into operation in the mine, which require new or different procedures.

* * * * *

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such task.

* * * *

(e) All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks.

Paragraph (a) of section 48.7, contains two exceptions to the stated new task training requirements, and they are as follows:

This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment.

The term "task" for purposes of the training requirements of the cited standard is defined as follows at section 48.2(a)(2)(f): "'Task' means a work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge."

MSHA cites two judges decisions in FMC Corporation v. Secretary of labor, 7 FMSHRC 1553 (October 1985), and Secretary of Labor v. WRW Corporation, 7 FMSHRC 245 (February 1985), in support of its conclusions that an untrained mobile equipment operator poses a hazard to his fellow miners, and that new task training promotes mine safety by giving miners greater awareness of work hazards. Although I agree with MSHA's conclusions, upon review of those decisions, I find that they are distinguishable from the facts in the instant case.

In the FMC Corporation case, Judge Lasher affirmed a violation of section 48.27 after finding that a foreman assigned a bulldozer operator to operate a front-end loader. The miner had never been required to operate a loader, had not been

observed him operate the loader, and did not believe that he had been trained in its operation. Further, once the miner proceeded to operate the loader, the foreman was displeased with his performance, but failed to remove him from the machine. The miner ultimately requested another miner to finish up his work with the loader because he was uncomfortable with the machine, and when the work was finished, the untrained miner drove the machine back to its original location.

In affirming the citation in the FMC Corporation case, Judge Lasher relied on the fact that the loader was substantially different from a bulldozer because of substantial differences in weight, size, function, controls, brakes, speed, and the moving and steering mechanisms. Even so, Judge Lasher observed that new task training is not automatically or necessarily required every time a miner is assigned to a new piece of equipment, and that the assignment would not be deemed a new work task if the new piece of equipment was essentially the same as the one regularly operated by the miner in the past.

The WRW Corporation case involved a situation in which two miners with no training and less than a month of experience died of carbon monoxide poisoning while working in an underground mine. Judge Melick found that the deaths resulted from grossly inadequate ventilation resulting from unlawful blasting, and his affirmance of violations of section 48.5 and 48.7, was based on the fact that the miners had absolutely no training at all, and that one of the miners began working in the mine on the night of his death.

The record in this case reflects that the foreman who trained Mr. Slaman in the operation of the scoop did not review his training records to confirm that he had in fact received prior training. MSHA suggests that the reason Consol maintains training records is so that they may be reviewed. I would suggest that Consol keeps training records because it is required to do so pursuant to MSHA's regulations, and that its failure to do so will subject it to a citation. Although from a safety standpoint, one would expect a prudent mine operator and supervisor to maintain its training records in such a manner as to have them readily available to insure that its work force is properly trained, Consol in this case is not charged with sloppy or non-existent record keeping. It is charged with a failure to properly train a scoop operator. Further, I find nothing in MSHA's record-keeping regulation, section

ing record to assure itself that he has adequate training. If MSHA deems this critical, then I suggest that it consider amending its regulation to make this a requirement. Although the facts in this case suggests that Consol has a serious problem with the record-keeping procedures of the mine safety department, and its counsel candidly admitted as much during the course of the hearing, this is a matter that MSHA may wish to consider in any future compliance inspections at the mine.

While I agree that Consol's failure to produce copies of Mr. Slaman's scoop training records raises an inference that he was not trained, I find no basis for concluding that all of its witnesses who have testified in this case have lied or perjured themselves. To the contrary, having viewed the witnesses during their testimony, they impressed me as credible individuals, and I find their testimony as to the training received by Mr. Slaman in the operation of a scoop to be believable and credible. Inspector Gibson himself candidly conceded that assuming the witnesses are believable, he would agree that Mr. Slaman received proper scoop training prior to the accident in compliance with MSHA's requirements. Inspector Gibson also agreed that if he were a section foreman, and needed a job done, he would have to rely on a miner's assurance to him that he was trained on a piece of equipment needed to do the job (Tr. 49). He also agreed that if an employee worked for him a number of times and he initially trained him and then observed him operating a piece of equipment, he would not necessarily train him again prior to assigning him a task, provided these observations were recent and within a 12-month period (Tr. 50).

MSHA's assertion that Consol may not avail itself of the first exception found in paragraph (a) of section 48.7, because its records do not reflect any task training for Mr. Slaman within 12-months prior to his being assigned to operate the scoop in July, 1986, raises an inference that this was the first time Mr. Slaman was assigned to operate the scoop in a longwall work environment. This is not the case, and the record shows otherwise.

While it is true that Consol and Mr. Slaman have not produced any copies of Mr. Slaman's scoop training certificates, Mr. Slaman, who has worked at the No. 7 Mine continuously since 1978, testified that since that time and up to the time of the accident on July 19, 1986, he had operated a scoop at least "a couple of hundred times," and since 1981 or 1982, he operated it "pretty continuously." He estimated that he operated the 601 S&S scoop, the type he was operating at the time

that on occasion he has operated an Eikhorn model and a model 610. Mr. Slaman also testified that during his employment in the mine he has received training and retraining in the operation of a scoop from at least 10 individuals, including one Charlie Johnson, and foremen Norman Cutright and David Hunt, both of whom testified in this case.

Mr. Slaman confirmed that his prior duties as a longwall shieldman required him to operate a scoop, and that during two longwall moves in 1983 and 1984, he was given scoop training by Mr. Cutright. Mr. Slaman also described other non-longwall work which he has performed, during which he operated a scoop. Longwall section foreman Cutright confirmed that he trained Mr. Slaman in the operation of the 601 S&S scoop during two longwall moves which occurred in February and September 1984. Mr. Cutright considered Mr. Slaman to be an experienced and competent scoop operator, and he confirmed that Mr. Slaman was specifically assigned to the longwall moves because the hazardous nature of such work requires an experienced and trained scoop operator.

Foreman David Hunt testified that he was Mr. Slaman's supervisor from 1985 until a few months prior to the hearing of August 27, 1987, when Mr. Slaman bid on another job. Mr. Hunt testified that he first trained Mr. Slaman in the operation of the 601 S&S scoop sometime during the fall of 1985 when the 6 Butt Longwall was being moved, and that subsequent to this training he observed Mr. Slaman operating the scoop on numerous occasions during the year while working under his supervision, including other longwall moves. Although Mr. Hunt stated that he was on vacation during the 2-week period immediately prior to the accident, he confirmed that he knew Mr. Slaman was assigned to the longwall move that was taking place at the time of the accident, that he had previously observed Mr. Slaman operating the scoop during his visits to the section to check on the progress of the work on the section, and he had previously observed Mr. Slaman operating a scoop while moving cribs.

Mr. Hunt testified that he considered Mr. Slaman to be an experienced trained scoop operator, and he confirmed that Mr. Slaman was assigned to do work on the longwall because of his experience and training. Mr. Hunt considered his training of Mr. Slaman on the scoop to be retraining or "follow-up" training, and that this is normally done when a longwall is to be moved in order to insure that miners involved in such moves are trained to do the work safely. Mr. Hunt confirmed that at the time he conducted his follow-up training of Mr. Slaman,

Mr. Slaman advised him that he was an experienced scoop operator and had received prior training, Mr. Hunt saw no need to give him any initial training.

With regard to MSHA's assertion that Consol may not avail itself of the section exception found in paragraph (a) of section 48.7, I take note of the fact that this exception contains two conditions. The first condition requires a showing that the miner has performed the work task in question within 12-months preceding the work assignment, and the second condition requires a showing that the miner has demonstrated safe operating procedures for the task within this same time frame. With respect to the first condition, I conclude and find that the respondent's credible testimony establishes that Mr. Slaman operated a 601 S&S scoop on a fairly regular basis within the 12-month period prior to the accident, and that he was an experienced and trained scoop operator.

Mr. Slaman confirmed that Mr. Hunt retrained him to abate the violation, and that prior to the accident Mr. Hunt routinely retrained him, worked with him a lot, and observed him operating the scoop. Although Mr. Slaman could not recall whether Mr. Hunt read him the Safe Work Instructions, he nonetheless confirmed that during Mr. Hunt's training, he would go over safety topics, "read me the retraining," instructed him in the operation of the scoop, and prior to assigning him any tasks, would ask about his scoop training. Mr. Slaman also confirmed that Mr. Hunt would retrain him from time-to-time, and he recalled one particular occasion when Mr. Hunt discussed the need to walk the roads looking for obstructions (Tr. 67-69; 88). Mr. Slaman also confirmed that he was retrained by Charlie Johnson on the scoop 2 or 3 weeks before the accident, and that Mr. Johnson read him the SWI and reviewed its "safety aspects." Mr. Slaman conceded that Mr. Johnson did not review the scoop controls with him, and he explained that this was because he was already familiar with the controls (Tr. 96).

ing safe operating procedures" entails more than the mere operation of the equipment. MSHA suggests that Mr. Slaman was somehow required to demonstrate to his supervisors that he could safely operate the scoop, but does not elaborate on how it expects this to be done. I find MSHA's argument to be as nebulous as the phrase it has attempted to explain.

Consol has established that the SWI used as part of Mr. Slaman's training has MSHA's approval, and that it was used in conjunction with his foreman's personal observations of his operation of a scoop on a number of occasions while in an underground work environment, particularly on the longwall. Further, there is no evidence in this case that Mr. Slaman has ever been involved in any prior accidents, or has ever been disciplined or cited for operating his scoop in an unsafe manner, and his supervisors considered him to be a competent and well-trained scoop operator.

MSHA's suggestion that the accident itself is ample evidence of Mr. Slaman's inability to safely operate a scoop is rejected. I cannot conclude that the occurrence of the accident per se establishes that Mr. Slaman was not trained in the technical and safe operation of the scoop he was operating at the time of that incident. Accidents involving miners whose training records may reflect that they are trained may occur at any time in an underground mine environment given the circumstances of each such incident. Since MSHA did not introduce its report of investigation concerning the accident, I have no way of knowing the extent and scope of Inspector Gibson's investigation of that incident. I take note of foreman Hunt's unrebutted testimony that Mr. Gibson did not discuss Mr. Slaman's training with him, and there is no indication that he discussed it with foreman Cutright.

Mr. Slaman testified that immediately prior to the accident he was concentrating on moving the pan line with the scoop, and that when he last observed the accident victim, he observed him in front of the scoop watching him move the pan line. He had no idea how the victim came to position himself next to the rib as it pivoted and pinned him against the rib. Inspector Gibson's notes reflect that "a breakdown in communication between the operator of the scoop and his helper resulted in this accident" (Exhibit G-4). Under the circumstances, it is altogether possible that the accident victim contributed to the accident though his inattention and lack of training.

citation and order were abated after Mr. Slaman was task trained "in the safe procedures of operating a scoop," and that all foremen and personnel "have been instructed that all persons will be in a safe position before equipment is moved or trammed." Mr. Slaman's unrebutted testimony is that this "training" simply consisted of someone reading the SWI to him, and his signing a safety form attesting to this fact, and that the form is on file with the company's safety department. Although the abatement action taken by Consol included cautionary instructions to individuals other than the equipment operator, Consol's counsel suggested that while there is no requirements that scoop helpers be included in the SWI training given equipment operators, all mine personnel are instructed to stay clear of tramping equipment as a general safety precaution (Tr. 197). In any event, the issue here is whether the scoop operator, not the helper, had received adequate training, and Consol has not been cited for any lack of training on the part of the helper who was injured. In the final analysis of this case, I am convinced that Inspector Gibson issued the violation because a serious accident had occurred and Consol could produce no records attesting to the fact that Mr. Slaman was a trained scoop operator. However, I am not convinced that MSHA has presented any credible evidence to support any such conclusion, or to support a violation of 30 C.F.R. § 48.7. Accordingly, the contested citation and order ARE VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT section 104(a) Citation No. 2713397, and section 104(g)(1) Order No. 2713396, issued on July 21, 1986, BE VACATED. MSHA's proposal for assessment of civil penalty for the alleged violation in question IS DENIED AND DISMISSED.


George A. Koutras
Administrative Law Judge

Therese I. Salus, Esq., Office of the Solicitor, U.S.
Department of Labor, Room 14480 Gateway Building, 3535 Market
Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Peelish, Esq., Consolidation Coal Company,
1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

/fb

DEC 22 1987

WHITE COUNTY COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 86-58-R
	:	Order No. 2817373; 2/6/86
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 86-59-R
ADMINISTRATION (MSHA),	:	Order No. 2817375; 2/12/86
Respondent	:	
	:	Pattiki Mine

DECISION

Before: Judge Melick

These cases are before me upon remand by a majority of the Commission for further proceedings consistent with its decision dated September 30, 1987. On November 30, 1987, the following stipulations were filed with the undersigned:

1. On February 6, 1986, MSHA Inspector Wolfgang Kaak inspected White County Coal Corporation's ("White County") Pattiki Mine. During his inspection, Inspector Kaak discovered that a chalk centerline had been drawn across an area of unsupported roof in a face area. Despite the fact that the Inspector did not observe the violation, he issued a § 104(d)(1) order of withdrawal, alleging an unwarrantable violation of 30 C.F.R. § 75.200 as follows:

A chalk centerline was observed on the roof of Room #6 running from the last row of permanent supports, roof bolts, inby to the face. This area was and had not been supported when the coal drill operator, (D. Marshall), made the centerline on the roof. The distance from the last row of bolts to the face was 13 ft. Working section I.D. 003-0.

Pattiki Mine and saw some footprints in an area of unsupported roof. Despite the fact that he did not see anyone walk under unsupported roof, he immediately issued a § 104(d)(2) order of withdrawal alleging an unwarrantable violation of 30 C.F.R. § 75.200:

Physical evidence, footprints, were observed going through an area of unsupported roof in the X-cut between Entry No. 6 and Entry No. 7 at Curve Y Spad No. 1773. The opening averaged about 10 ft. long by 10 ft. wide. The height average was 6 ft. The area was rockdusted and footprints were clearly visible. Working Section I.D. 002-0.

Order No. 2817375. The order was terminated approximately one hour after it was issued, after the crew was re instructed on the roof control plan and the area had been permanently supported.

3. On March 7, 1986, White County filed Notices of Contest challenging Order No. 2817373 and Order No. 2817375. The cases were consolidated by the Administrative Law Judge.

4. On April 25, 1986, White County filed a Motion for Summary Decision alleging that Order Nos. 2817373 and 2817375 were invalid because the violations had already been abated when the closure orders were issued and that Section 104(d) closure orders can only be issued for existing practices or conditions actually perceived by an MSHA inspector as required by the Federal Mine Safety and Health Act of 1977 ("the Act"). The Secretary filed a response in opposition to White County's motion.

5. On June 9, 1986, the Administrative Law Judge granted White County's Motion for Summary Decision and modified the orders to Section 104(a) citations.

6. The Administrative Law Judge issued an order dismissing the cases on June 30, 1986, noting that White County did not "dispute either the existence of the violations alleged in these citations or the 'significant and substantial' findings associated therewith".

7. After briefing and oral argument, the Commission issued a decision on September 30, 1987, reversing the Administrative Law Judge's decision as to White County's motion for Summary Decision and vacating

...modification of the Section 104(a) orders to
Section 104(a) citations. The Commission remanded the
case [to] sic the Administrative Law Judge for further
proceedings.

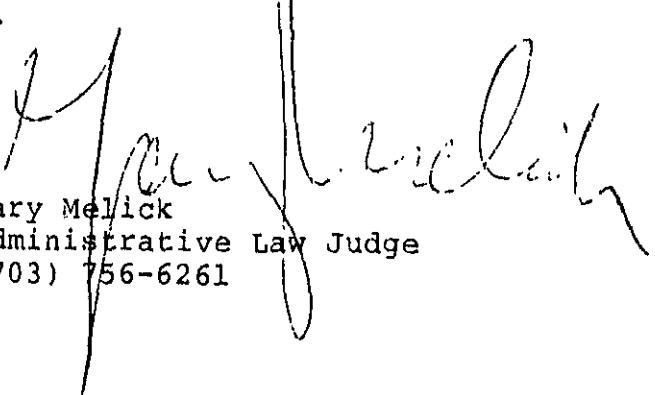
8. Because White County wishes to obtain prompt review of the Commission's September 30, 1987, decision but is unable to do so until a final order is issued in this matter, it has entered into these stipulations to eliminate the less important issues which remain in order to facilitate and expedite such review.

9. White County hereby agrees to withdraw its Notices of Contest to the extent that White County no longer challenges the finding of unwarrantability. White County, despite the Commission's September 30, 1987, decision in this case, continues to contest the § 104(d) orders on the grounds that they were based on an investigation of past, already abated, violations instead of an inspection of existing violations as White County contends § 104(d)(1) requires.

10. With this limitation of the basis of White County's challenge to the orders, the Commission's resolution of the issues raised by White County's Motion for Summary Decision as to whether a Section 104(d) order can be based on an investigation of a past, already abated, violation instead of an inspection of an existing violation is dispositive of White County's Notices of Contest, and on that basis, it is stipulated that it would be appropriate; that the Administrative Law Judge enter a final order in these cases.

11. No further hearings are necessary in this matter.

The above stipulations are accepted for purposes of these proceedings. The record is sufficient from which it can be inferred that the admitted violations were caused by the "unwarrantable failure" of the mine operator to comply with the cited standards. The Contests herein are accordingly denied and dismissed on the basis of the Commission's decision in these cases rendered September 30, 1987.


Gary Melick
Administrative Law Judge
(703) 756-6261

Timothy M. Biddle, Esq., Barbara A. Myers, Esq., Crowell & Moring, 1100 Connecticut Ave., N.W., Washington, DC 20036 (Certified Mail)

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

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DEC 28 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 87-204-M
Petitioner : A.C. No. 26-01874-05504
: :
v. : West Ann Road Pit
: :
M & M CONSTRUCTION INC., :
Respondent : :

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco,
California,
for Petitioner;
Tommy F. Deaver, Esq., Deaver & Associates, Las
Vegas, Nevada,
for Respondent.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (Mine Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges the operator of the West Ann Road Pit with the violation of 9 Mine Safety and Health standards.

This proceeding was initiated by the Secretary with the filing of a proposal for assessment of civil penalties. The operator filed a timely appeal contesting the existence of the alleged violations and the amount of the proposed civil penalties. The hearing was held on November 18, 1987, at 10:00 a.m.

Discussion

, an MSHA mine inspector, based upon his inspection of the West Ann Road Pit issued nine citations for eight violations of safety standards and one violation of safety standard 30 C.F.R. § 56.14006.

Section 56.14001 requires guarding or exposed moving machine parts which may cause injury when contacted by persons. Section 56.14006 requires machinery guards to be securely in place while machinery is being operated except when testing machinery.

On May 13, 1987, MSHA issued proposed assessments totaling \$1,728.00. The proposed assessments were duly contested.

At the November 18, 1987 hearing the parties on the record stated that they had reached a settlement subject to the approval of the judge and filed a motion for an order approving the settlement.

Counsel for the Secretary proposed that the penalty for each of the nine alleged violations be reduced from \$192.00 to \$111.00 thus reducing the original proposed penalties totaling \$1,728.00 to a total of \$999.00.

The amended proposed penalties take into account those factors required to be considered by Section 110(i) of the Act.

Stipulations

The parties stipulated as follows:

1. History - in the previous twenty-four months respondent has had eight assessed violations.
2. Size - The size of the respondent operator at its one facility is approximately 5,000 man-hours per year. This is a small operation.
3. Ability to Continue in Business - Payment of the proposed penalties will not impair the ability to continue in business.
4. Good Faith - Respondent abated the violative conditions within the required time for abatement.
5. Negligence - Negligence is considered moderate.
6. Gravity - Further analysis indicates that only one employee, rather than two employees, is reasonably likely to be exposed to these violations. Thus, while still significant and substantial violations, the gravity is less and the penalties should be reduced accordingly.

Respondent withdrew its notice of contest and agreed to pay the proposed penalties as amended.

After careful review and consideration of the pleadings, arguments, and the information placed upon the record at the hearing, I'm satisfied that the proposed settlement disposition is reasonable, appropriate and in the public interest. It is consistent with the criteria in Section 110(i) of the Act.

Accordingly, the motions made at trial are granted.

ORDER

Good cause having been shown each of the nine citations is affirmed and respondent is ordered to pay a civil penalty of \$999.00 within 30 days from the date of this decision.


August F. Cetti
Administrative Law Judge

Distribution:

Marshall P. Salzman, Esq., Office of the Solicitor, U.S.
Department of Labor, 71 Stevenson Street, 10th Floor, P.O. Box
3495, San Francisco, CA 94119-3495 (Certified Mail)

Tommy F. Deaver, Esq., Deaver & Associates, 810 East Charleston
Boulevard, Las Vegas, NV 89104 (Certified Mail)

/bls

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 29 1987

YOUNGHIOGHENY & OHIO COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	Docket No. LAKE 86-30-R
v.	:	Order No. 2823831; 11/19/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Nelms No. 2 Mine
Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
Petitioner	:	Docket No. LAKE 86-56
v.	:	A. C. 33-00968-03629
YOUNGHIOGHENY & OHIO COAL COMPANY,	:	Nelms No. 2 Mine
Respondent	:	

DECISION

Before: Judge Melick

These cases are before me upon remand by the Commission on December 11, 1987, to reconsider the civil penalty assessment for the violation charged in Order No. 2823831. Youghiogheny & Ohio Coal Company v. Secretary of Labor etc., 9 FMSHRC ____ (Docket No. LAKE 86-21-R et. al.). In its decision the Commission held that the so called "hole through" violation cited in the order was not "significant and substantial". Although the violation resulted in a large area of unsupported roof being exposed the Commission did not believe that there was a reasonable likelihood that a roof fall would result in an injury. It stated as follows:

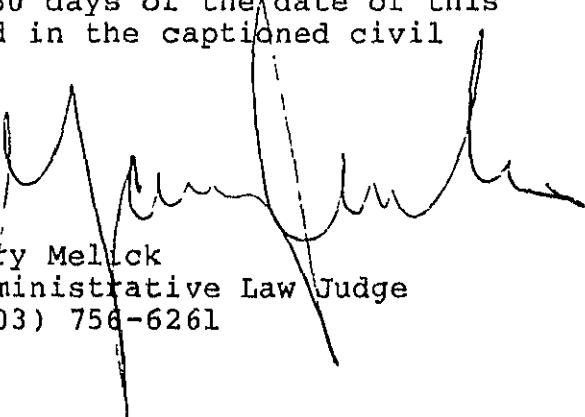
It is undisputed that the section foreman operating the continuous mining machine was under supported roof at all times when he made the fan cuts and the "hole through." [citations omitted] It also is undisputed that Y&O was not going to mine further the rooms involved; these were the last cuts. Thus, had normal mining operations continued, no miners would have entered the rooms in which the "hole through" occurred.

the rooms leading to the "hole through." In light of these facts, we hold that substantial evidence does not support the judge's conclusion that the violation significantly and substantially contributed to a mine safety hazard.

If one accepts these findings, then the violation must be characterized as non-serious. The violation was, however, the result of a high degree of negligence and the operator has a substantial history of violations. In determining an appropriate civil penalty for the violation I am also considering the factors noted in my decision below that "the mine operator abated the cited conditions in a timely and good faith manner, [and it] was moderate in size." (8 FMSHRC at pages 954-955). Under the circumstances, and in consideration of the Commission's findings noted herein, a civil penalty of \$300 is appropriate.

ORDER

The Youghiogheny & Ohio Coal Company is hereby ordered to pay a civil penalty of \$300 for the violation charged in Order No. 2823831 and, if it has not already done so, to pay civil penalties totalling \$1,272 within 30 days of the date of this decision for the violations charged in the captioned civil penalty proceeding.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Robert C. Kota, Esq., Youghiogheny & Ohio Coal Company, P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

npt

DEC 29 1987

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 87-272
Petitioner : A. C. No. 46-07273-03501
v. :
: No. 1 Mine
BIRCHFIELD MINING INCORPORATED, :
Respondent :

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia for
Petitioner;
William D. Stover, Esq., Beckley, West Virginia for
Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Birchfield Mining Incorporated (Birchfield) with one violation of the mandatory regulatory standard at 30 C.F.R. § 75.303(a). The general issue before me is whether Birchfield violated the cited regulatory standard and, if so, whether the violation was the result of the "unwarrantable failure" of Birchfield to comply with the standard and whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violation was "significant and substantial." If a violation is found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of Act.

The citation at bar, issued pursuant to section 104(d)(1) of the Act, charges as follows:

An inadequate preshift examination was made in the 001-0 graveyard main section in that the results of the examination was [sic] not reported to a person designated by the operator to receive such reports at a designated station on the surface of the mine before other persons enter the underground area of such mine to work in such shift. The

[sic] examination of the cited MMU showed no dates, times or initials have been placed in conspicuous locations.

The cited standard, C.F.R § 75.303(a) provides as follows:

[w]ithin 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make test for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine. No person other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted. Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also

pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

John Baugh, a Coal Mine Inspector for the Federal Mine Safety and Health Administration (MSHA) arrived at the Birchfield No. 1 Mine at about 7:20 a.m. on April 2, 1987, in conjunction with his work as an ventilation specialist. At that time Baugh observed several miners, who had just changed into work clothes, proceed underground. It is not disputed that these miners were part of the 8:00 a.m. to 4:00 p.m. day-shift crew. Apparently concerned that the day shift crew was entering the mine before the completion of the preshift examination, Baugh checked the mine examiner's books and found no entry for the corresponding preshift exam. Baugh then proceeded underground and found no initials, dates or times evidencing a preshift examination. A "fire boss board" outside the mine portal did show that the mine had been "cleared" but only for the preceding midnight shift. Thus it appeared to Inspector Baugh that the day shift employees had gone underground before the preshift examination had been reported out.

Richard Henderson, the midnight shift section foreman, was told of the alleged violation and reportedly then agreed to perform a preshift exam and report it in the examination book. According to Baugh, Henderson later reported the results into the book at 8:45 that morning. Henderson disagreed however that there was any violation, maintaining that it was not a violation so long as the examination was reported by the beginning of the shift at 8:00 a.m. Accordingly he felt that the day shift miners could report into the mine before 8:00 a.m. and before the completion of the examination without violating the cited standard.

Baugh deemed this violation to be "significant and substantial" and a serious hazard for several reasons. He first noted that the Birchfield No. 1 Mine was located as close as 20 feet from a bleeder system in an adjacent mine having a high concentration of methane. Moreover Birchfield was not drilling the required test holes 20 feet in advance of mining to prevent an unexpected inundation of black damp (oxygen deficient air) or methane. Baugh also observed that the Birchfield mine itself liberated methane and that one of the fans ventilating the mine was not then functioning thereby causing excessive dust to be blown across the working miners. He opined that the excessive dust presented a health threat in the form of respirable dust as well as an explosive hazard. Under the circumstances Baugh concluded that there was a serious hazard to both the health and

issuance of the citation.

Richard Henderson, Birchfield's midnight shift section foreman on April 2, 1987, was in charge of the five member production crew on that shift. He acknowledged that 3 or 4 day shift employees went underground as early as 7:30 that morning before he was able to make the preshift examination entries. He could not recall whether he had talked to Inspector Baugh before he had completed the report and could not recall whether Baugh observed him make the entry. In addition Henderson could not remember whether he had completed the preshift examination before the day shift miners entered the mine. He does remember, however, that when the day shift miners did enter the mine he had not yet completed the reports for either the on-shift exam for the midnight shift or the preshift exam for that day shift and that he was the person designated to perform that preshift exam. Henderson also believed that he completed his preshift mine examination report between 7:30 and 8:00 a.m. on the morning of the 2nd and more likely between 7:45 a.m. and 8:00 a.m. He recalled that he found no methane at the faces after checking with a methane detector at the last row of roof bolts. He claims he was not aware of the citation for inadequate preshift examination until later but he could not recall when.

Avery Bailey, Birchfield's General Mine Forman, also disagreed with Inspector Baugh. Bailey felt that it was proper to allow the day shift miners to proceed underground before reporting the preshift exam results because the mine had already been preshifted before the midnight shift and because all of the day shift miners were certified fire bosses. Bailey acknowledged however that only Henderson was the fire boss designated to perform the examination to be reported out. Bailey thought that the preshift book was completed prior to the 8:00 a.m. shift change because he recalled Henderson come out of mine and fill out the book.

In summary, it is undisputed that 3 to 4 day shift miners went underground into the active workings of the Birchfield No. 1 Mine around 7:30 on the morning of April 2, 1987, and that the day shift did not commence until 8:00 a.m. The credible evidence also shows that at the time these miners entered the mine, the designated preshift examiner had not reported the results of any preshift examination to the surface of the mine. I am also persuaded by the affirmative testimony of Inspector Baugh that the preshift examination had not been completed at the time these miners entered the mine. Preshift examiner Richard Henderson could not even remember whether he had completed the exam. It is also not disputed that when the day shift miners entered the

~~mine, no dates, times or initials had been placed in conspicuous locations" to evidence the completion of a preshift examination~~

Birchfield argues that the cited standard is ambiguous and maintains that so long as the preshift examination is complete and properly reported by the commencement of the shift at 8:00 a.m. it is in full compliance and it is therefore immaterial that miners in the shift had entered the mine before the completion of such examination.

The regulation requires however that the preshift examination be completed "within three hours immediately preceding the beginning of any shift and before any miner in such shift enters the active workings of a coal mine" (emphasis added). The regulation also requires that the mine examiner report the results of his examination "to a person designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mines to work in such shift" (emphasis added). There is no ambiguity in this language and the plain meaning must prevail. The preshift exam must therefore be completed and reported to the surface before any miner in the oncoming shift enters the active workings or the underground areas to work in that shift, respectively.

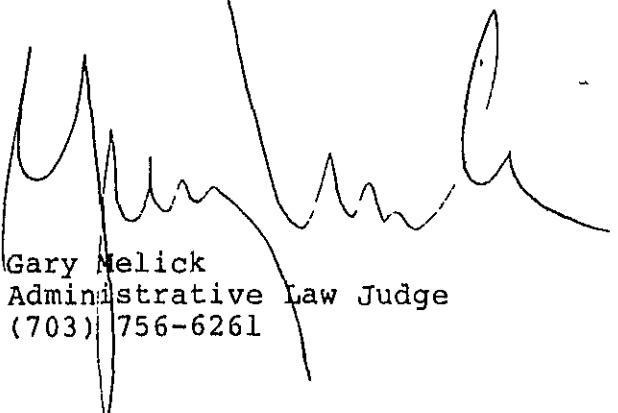
Under the circumstances I find that the violation is provable as charged. Since the requirement of the standard is set forth in plain and unambiguous language I also find that the operator's agents should have known of the violation. Accordingly I find that the violation was the result of inexcusable aggravated conduct, constituting more than ordinary negligence, and therefore the result of the "unwarrantable failure" of the operator to comply with the law. Emery Mining Corporation v. Secretary, 9 FMSHRC ____, Docket No. WEST 86-35-R (December 11, 1987); Zeigler Coal Corp., 7, IBMA 280 (1977); U.S. Steel Corp., 6 FMSHRC 1423 (1984). For the same reasons I find that the violation was the result of significant operator negligence.

Within the framework of the evidence herein I also find that the violation was "significant and substantial" and a serious hazard. Secretary v. Mathies Coal Company 6 FMSHRC 1 (1984). In reaching this conclusion I have not disregarded the evidence that no methane was found during the inspection at issue and that mining was not then progressing toward the adjacent bleeder. However the operative time frame for determining the reasonable likelihood of an injury includes the expected continuance of normal mining operations. Secretary v. Halfway Incorporated, FMSHRC 8 (1986).

In assessing a civil penalty in this case I have also considered that the operator is relatively small in size, promptly abated the violation, and had no history of violations. Accordingly I find that a civil penalty of \$400 is appropriate.

ORDER

Citation No. 2909257 is affirmed as a citation under section 104(d)(1) of the Act. Birchfield Mining Incorporated is directed to pay civil penalties of \$400 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Mary K. Spencer, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

William D. Stover, Esq., 41 Eagles Road, Beckley, WV 25801 (Certified Mail)

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 30 1987

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 87-44-DM
ON BEHALF OF	:	
RICHARD W. HAVILAND,	:	Docket No. SE 87-89-DM
Complainant	:	
v.	:	Swift Creek Mine
	:	
OCCIDENTAL CHEMICAL COMPANY,	:	
Respondent	:	
	:	
and	:	
INTERNATIONAL CHEMICAL	:	
WORKERS UNION, LOCAL NO.	:	
784,	:	
Intervenor	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On December 2, 1987, the Secretary filed a motion to withdraw its complaint in this case on the grounds that Complainant and Respondent reached a settlement in this matter according to which Richard Haviland is to receive a lump sum payment in compensation for the period June 30, 1986 to March 9, 1987, to be restored to all fringe benefits of his employment, to be reinstated to the position of Combination Analyst Repairman, to be reimbursed for covered medical claims accruing during the period June 30, 1986 to March 9, 1987, and to have his personnel records expunged of the complained-of discharge. On December 9, 1987, the Intervenor replied to the motion and stated that under the collective bargaining contract, Mr. Haviland would not be entitled to be reinstated in the position of Combination Analyst Repairman.

On December 14, 1987, the matter was discussed in a conference call with counsel for the Secretary and Respondent and Representatives of the Intervenor. The position of the Intervenor Union is that Haviland can claim the right to

Repairman, approximately the same rate of pay. At my request Mr. Haviland submitted a statement, filed December 23, 1987, in which he indicated that he was aware of the position of the Union, but nevertheless desired to withdraw his complaint in accordance with the settlement agreement.

I have considered the motion and related filings and conclude that the settlement is in the best interest of the Complainant, and in furtherance of the purposes of the Act. Therefore, the motion to withdraw is GRANTED, and these proceedings are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Glenn Embree, Esq., U.S. Department of Labor, Office of the Solicitor, 1371 Peachtree St., N.E., Rm. 339, Atlanta, GA 30367 (Certified Mail)

Thomas Means, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, DC 20004 (Certified Mail)

Ben Cox, President, Local 784, International Chemical Workers Union, Rt. 1, Box 114-A, White Springs, FL 32096 (Certified Mail)

slk

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